Supreme Court, U.S.
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No. 04-

IN THE

# Supreme Court of the United States

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

*Petitioner*,

*v.*

TIMOTHY VONDERHARR; KAREN VONDERHARR, MINOR BY HER GUARDIAN AD LITEM, TIMOTHY VONDERHARR; LAUREN VONDERHARR, MINOR BY HER GUARDIAN AD LITEM TIMOTHY VONDERHARR; SARA VONDERHARR, MINOR BY HER GUARDIAN AD LITEM, TIMOTHY VONDERHARR; CHARLES R. WELDON LAW OFFICES; DOES, ITO X, INCLUSIVE; MCCLELLAN & ASSOCIATES, A PROFESSIONAL CORPORATION,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Ninth Circuit ruled that Petitioner Carpenters Health & Welfare Trust for Southern California ("CHWT"), an employee benefit plan governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, could not, under Section 502(a)(3) of ERISA, enforce its reimbursement clause against a participant and his family ("participant"). The reimbursement clause provides for – and the action CHWT filed to enforce that clause sought – recoupment of benefits CHWT paid to the participant. The recoupment would be paid from settlement funds the participant and his family received in a state personal injury action ("PI Litigation") brought against parties that caused the participant injuries. The district court ruled and the Ninth Circuit, in surveying a supposed "solid wall of authority" on this issue, agreed that the clause was not enforceable under Section 502(a)(3). It did so despite the contrary rulings contained in this Court's decisions in *Great West Life v. Knudson*, 534 U.S. 204 (2002) and *Harris Trust & Savings Bank v. Salomon Smith Barney*, 530 U.S. 238, 251 (2000) and the opinions of Third, Fourth, Fifth, Sixth, and Seventh circuit courts of appeal.

In dismissing CHWT's reimbursement action, the district court, however, also denied the participant's application for fees under Section 502(g) of ERISA. The Ninth Circuit reversed, holding that the application of the "special circumstances" rule – a rule which raises a presumption that a participant that prevails in an action as a plaintiff seeking benefits – should apply in a case where the participant was a defendant. The ruling's implicit finding that it had jurisdiction to award fees and the application of the "special circumstances" rule conflicts with the decisions of eight circuit courts of appeal, which are First, Third, Fourth, Fifth, Sixth, Eighth, Eleventh, and D.C. circuit courts of appeal.

1. Does Section 502(a)(3) of ERISA authorize an action to enforce a plan's reimbursement clause, where such a clause requires a participant to repay a plan for benefits paid for injuries caused by another party and where the source of repayment comes from sources such as a personal injury settlement that is related to the injuries the participant suffered?

2. Does the dismissal of an action under Section 502(a)(3) of ERISA to enforce a plan's reimbursement clause deprive a court of jurisdiction to award fees under Section 502(g)(1) of ERISA because the underlying dismissal was one for lack of subject matter jurisdiction?

3. If a court can exercise jurisdiction to award fees to a prevailing participant defendant in a reimbursement action under Section 502(a)(3) of ERISA, what standard applies in determining whether the prevailing participant is entitled to fees under Section 502(g)(1) of ERISA?

## PARTIES LISTED AND CORPORATE DISCLOSURE STATEMENT

The parties listed below are listed in the caption. CHWT is an employee benefit plan governed by ERISA. It issues no stock, it has no parent company, and it is not owned by any publicly held company.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Carpenters Health & Welfare Trust v. Vonderharr*, 384 F.3d 667 (9th Cir. 2004). (Appendix A.) The Ninth Circuit affirmed in part the November 18, 2002 decision of the United States District Court, Central District of California dismissing CHWT's First Amended Complaint (Appendix C) and reversed its January 16, 2003 decision denying the participant's fee motion. (Appendix B.)

## STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit rendered its decision on September 15, 2004. It denied CHWT's Petition for Rehearing En Banc on November 5, 2004. (Appendix D.)

## STATUTES INVOLVED

**Title 29 United States Code, Section 502(a)(3)**

**Civil Enforcement.**

(a) Persons empowered to bring a civil action. A civil action may be brought ... (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

**Title 29 United States Code, Section 502(g)(1)**

**Attorney's fees and costs; awards in actions involving delinquent contributions.**

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

## STATEMENT OF THE CASE

Respondent Timothy Vonderharr, his wife Karen, and their two daughters are participants and beneficiaries of CHWT. On or about December 26, 1998, the Vonderharrs were traveling in a car in Fullerton, California when it was struck by a vehicle driven by Mela Elizabeth Rodriguez. As a result of this accident, each of the Vonderharrs suffered injuries.[1] They retained counsel – the first of which was Charles Weldon, who was then substituted out for their current counsel of record – and filed suit against, among others, Mela Rodriguez, Jose Rodriguez (the owner of the

1. Unfortunately, Lauren suffered major injuries. Despite the inordinate amount of costs that were registered in paying for her medical care, CHWT ensured that benefits were paid so that she received the medical care she needed. In making its claim for reimbursement, CHWT is only asking for benefit reimbursement from the money she recovered in her personal injury settlement. Quite significantly, the amount CHWT is asking for is that amount that remains after she has paid off her lawyers fees and any other reasonable costs associated with the PI Litigation. In doing so, CHWT retains – when it did not have to – the common law "make whole" rule and ensures that any money it seeks will come from a net sum that remains after all other bills are paid.

car), and Ford Motor Company. Prior to paying claims resulting from their injuries, CHWT required the Vonderharrs and Weldon to execute a document giving CHWT a lien on any recovery they obtained in their personal injury lawsuit ("PI Litigation"):

> You and those acting for you will be required to sign documents to carry out [CHWT's] reimbursement rights. If you fail to sign these documents or otherwise to fulfill the reimbursement obligation, [CHWT] may refuse to extend any benefits that would otherwise be provided by [CHWT] for the injuries or illnesses involved.

In addition, before benefits were paid for their accident related claims, Weldon (and their second attorney) was specifically instructed to keep CHWT apprised of any developments in the PI Litigation and of any settlement that was reached. On March 12, 2001, the Orange County Superior Court approved a settlement reached between the Vonderharrs and the Rodriguezs. Neither the Vonderharrs nor counsel informed CHWT of the settlement. CHWT became aware of this settlement in May 2002 only after obtaining the docket sheet for the Litigation. During this time, CHWT faithfully paid $155,234.43 in benefits on behalf of the Respondents, believing all the while that Respondents would reimburse CHWT after they settled or obtained a judgment from the third party tortfeasors.

After the Vonderharrs settled the Litigation in its entirety, CHWT made demand on the Vonderharrs's counsel and counsel for the other third party tortfeasors for the funds subject to the Liens they executed. The Vonderharrs's counsel refused. Thereafter, CHWT sought to resolve this matter short

of litigation and made several diligent efforts to obtain some basic information about the PI Litigation. When the Respondents refused to even disclose whether or not the settlement they obtained would cover the amount of the lien in this case, CHWT was, as noted above, forced to bring suit against all the parties.

On June 21, 2002, CHWT filed its action for reimbursement. Jurisdiction was proper pursuant to 28 U.S.C. § 1331. On November 14, 2002, the United States District Court, Central District of California dismissed CHWT's First Amended Complaint (Appendix C). On January 16, 2003, it denied the participant's fee motion. CHWT filed its notice of appeal on December 10, 2002. Jurisdiction in the court of appeal was invoked pursuant to 28 U.S.C. § 1291. The Ninth Circuit rendered its decision on September 15, 2004. After receiving a one week extension in which to file its Petition for Rehearing En Banc, CHWT timely filed its Petition for Rehearing En Banc on October 6, 2004. The Ninth Circuit denied that Petition on November 5, 2004.

## REASONS FOR GRANTING THE PETITION

The questions presented in this writ are important questions in light of the deepening health care crisis that plans face and will continue face. These issues implicate the viability of health plans everywhere and their ability to provide meaningful health benefits to their participants, on which the circuits are split and on which this Court's guidance is urgently warranted.[2]

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2. An issue litigated below, but one that CHWT is not seeking review on, is whether state reimbursement claims are preempted by ERISA. The panel, based on a prior Ninth Circuit ruling in *Provident*

(Cont'd)

The proposition that health care costs are skyrocketing is one that clearly needs no support today. Indeed, it comes as no surprise that "rising health care costs" are, according to a recent AON Consulting study, the "top employee benefits challenge for 2003."[3] Apart from figuring out how to catch up to this increased cost of healthcare, plans are further saddled with the fact that they must do so with a vanishing base of plan assets. In order to stave off financial collapse, CHWT, like many other multi-employer or single employer plans, has sought to limit plan losses and preserve plan assets by promulgating a reimbursement clause, which, among other things, requires a participant to execute a lien memorializing CHWT's reimbursement rights before paying any benefits. The Ninth Circuit's decision, however, not only robs CHWT of the bargain it struck with the participant in this case, its holding that reimbursement clauses are unenforceable will drive CHWT to consider slashing more benefits and to, as some other plans have, consider refusing to cover injuries caused by third parties.[4]

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(Cont'd)
*Health Plan v. McDowell*, 385 F. 3d 1168 (9th Cir. 2004), vacated the District Court's ruling that such claims were preempted. On December 28, 2004, the participant in *McDowell* filed a petition for certiorari with this Court, which bears Case Number 04-883.

3. That study projects that health and welfare plans could sustain an eight percent "affordable limit" in the increase of health care costs. The problem, however, is that that same study also projected an increase in health care costs of a staggering 14 percent. In real numbers, this means that, by 2008, plans can only afford to spend $7,650 per employee, but must somehow scramble to pay the $10,600 per employee figure that is projected for that year.

4. *See, e.g., http://www.opeiufunds.org/pdf/summary_plan_description.pdf* (p. 49 (section captioned "Assignment and Reimbursement to Fund of Benefit Payments for Accident or Injury) (last accessed on December 8, 2004).

Unfortunately, without such a provision, some plans are literally one catastrophic accident away from the steps of bankruptcy court. The economic quandary this places plans in was eloquently expressed by the district court judge below in his ruling denying the participant his attorneys fees:

> Defendants did not seek to benefit other ERISA participants and beneficiaries of the plan. By retaining the money expended by [CWHT] on their behalf while receiving funds from the underlying state court settlement, [defendants] have actually reaped a windfall at the expense of all ... . Ultimately the legal question decided in this case will benefit only a subset of participants and beneficiaries. Moreover, as discussed above, Defendants did not seek to vindicate a right under ERISA as much as they sought to secure a windfall from [CHWT's] inability to obtain reimbursement.

The upshot of this decision is that participants like those here will enjoy a double recovery: they first will receive monies from a health and welfare plan to pay for medical services rendered for their injuries, and they then will receive a second payment for these same services through a personal injury settlement. By enforcing a reimbursement clause such as the one in this case, it will avert the careening financial stability that plans now face and the difficult decisions that some will face, such as whether to entirely exclude coverage for injuries caused by third parties.

Furthermore, the Ninth Circuit's bar on reimbursement portends an ominous future for those seeking monetary based redress for conduct that falls short of fraud. This is because the Ninth Circuit's rule is based on its far reaching rationale

that "equitable relief" under Section 502(a)(3) does not ever contemplate money damages, unless some type of fraud or wrongdoing is committed. *FMC Corp. v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997). This is nothing more than a bar to parties – whether they be participants or plans – seeking money under Section 502(a)(3), even though equitable relief can clearly involve monetary recovery, far beyond the reimbursement context. For instance, the Ninth Circuit's "no money" rule has barred a plan from seeking money from an apprentice that violated his apprenticeship agreement. *See Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster*, 332 F.3d 1234 (9th Cir. 2003).[5] This nonsensical rule has also erected a barrier to participants who seek money-based equitable relief against plans who commit acts of negligence which stop short of fraud or wrongdoing that cause them monetary harm. *Cf. Leung v. Skidmore*, 213 F. Supp. 2d 1097 (N.D. Cal. 2002). Also, if *Harris Trust* had involved a negligent purchase and sale agreement, the plan in that case would have been out of luck on the Ninth Circuit standard since fraud or wrongdoing did not be. Simply put, monetary obligors in the Ninth Circuit can inexplicably escape liability for money relief by the artificial fiction that the Ninth Circuit has raised on this issue. This rule therefore threatens not only plans that seek to protect the financial integrity of their assets to benefit their participants, but it also puts participants at the mercy of plans and third party service providers who commit acts of negligence that cause them grave economic harm.

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5. At least one court has noted that the Ninth Circuit's ruling in *Foster* is not a retreat from its well-established view set forth in *Owens. Qualchoice v. Rowland*, 367 F. 3d 646 n.3 (6th Cir. 2004). In Section I below, however, CHWT will argue in the alternative that *Foster* is a Ninth Circuit case that actually conflicts with the holding by the Ninth Circuit panel in this case.

## I. The Court Should Grant The Petition To Resolve A Conflict Between The Ninth Circuit, On The One Hand, And Other Circuit Courts Of Appeal And This Court, On The Other, Regarding The Issue Of Whether An Employee Benefit Plan May Seek Reimbursement Through A Constructive Trust Or Equitable Lien Pursuant To ERISA § 502(a)(3)

Section 502(a)(3) of ERISA provides that a civil action may be brought by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan. In its opinion below, the Ninth Circuit relied on a line of authority pre-dating *Knudson.* That authority requires parties seeking reimbursement under Section 502(a)(3) to show the commission of fraud when the plan pays benefits on behalf of its participants. This is an insuperable burden and one never mentioned in *Knudson* – indeed, it is in fact denounced in *Harris Trust* – and is one that was, as will be explained below, roundly struck down in post-*Knudson* courts of appeal decisions. Simply put, the Ninth Circuit stands alone in holding that there is some wrongdoing requirement in such cases.

In *Knudson*, the Supreme Court interpreted the scope of the phrase "other appropriate equitable relief" in the context of cases like the one here: such cases involve a plan's suit for repayment of benefits paid to a participant for injuries he or she suffered as a result of a third party's action. *Great West Life v. Knudson*, 534 U.S. 204, 213 (2002). *Knudson* permitted a plan seeking repayment of funds to state a claim for restitution in the form of a constructive trust or equitable lien. In order to state such a claim, the plan must sue to "restore to the plaintiff particular funds or property in the

defendant's possession." On the strength of this new rule, every circuit other than the Ninth Circuit has permitted such claims when a plan was suing a defendant in possession of particular funds or property. *Qualchoice v. Rowland*, 367 F.3d 638, 645-47 (6th Cir. 2004) (cataloging circuit treatment of reimbursement cases and noting that all circuits considering reimbursement (*i.e.*, Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits) save the Ninth Circuit have allowed for equitable relief where plan could show defendant in possession of identifiable funds) (*see Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-22 (2d Cir. 2003), *cert. denied*, 157 L. Ed. 2d 312, 124 S. Ct. 435 (Oct. 20, 2003), and *cert. denied*, 157 L. Ed. 2d 744, 124 S. Ct. 929 (Dec. 8, 2003); *Sackman v. Teaneck Nursing Ctr.*, 86 Fed. Appx. 483, 2003 WL 23173649 (3d Cir. 2003); *Local 109 Ret. Fund v. First Union Nat'l Bank*, 57 Fed. Appx. 139, 2003 WL 152851 (4th Cir. 2003); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough*, 354 F.3d 348 (5th Cir. 2003); *Admin. Comm. of the Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir. 2003), *cert. denied*, 159 L. Ed. 2d 828, 124 S. Ct. 2904 (2004).). The only instances when a non-Ninth Circuit court has denied such relief were instances where the plan was simply seeking relief from a defendant who had no particular pool of funds from which to seek restitution. *See, e.g., Qualchoice*, 367 F.3d 647 ("In each of these cases, we simply held that the plan fiduciary sought legal relief for breach of contract. None of them, however, forecloses jurisdiction over the ostensibly equitable relief QualChoice seeks.").

As a result, the Ninth Circuit's survey of a supposed "solid wall of authority" of (Ninth Circuit) authority – without

even acknowledging that every other circuit disagreed with this "solid wall of authority" – governing reimbursement claims is simply one that stands starkly alone among the federal circuit courts of appeal that have considered this issue. In fact, the seriously flawed basis of this standard prompted Judge Posner of the Seventh Circuit to observe that the Ninth Circuit "has given no reason for this belief and there is no basis for it either in ERISA or in the principles of equity." *Health Cost Controls, Inc. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999).

Even more, the Ninth Circuit misread its own precedent in *Foster*. There, an apprenticeship plan sought to recover training expenses from an apprentice who breached his apprenticeship agreement. In discussing this case in its survey, the panel seized on *Foster*'s holding on the facts specific to that case to, once again, extrapolate a rule of law. In the panel's opinion, because *Foster* held that the relief sought in that case was legal, the Ninth Circuit once again reaffirmed its position that reimbursement suits are not ones in equity. What the panel failed to realize was the fact that the court in that case denied relief only because the plan in *Foster* was not seeking to sue any defendant with possession of any specific pool of money. This is evident from the following passage:

> Thus equitable restitution is available where the specific res or funds can be identified and attached by equitable lien or constructive trust, but not where the plaintiff seeks to impose general personal liability as a remedy for the defendant's monetary obligations.

*Foster*, 332 F.3d at 1238. This is also evident from the fact that *Foster* expressly distinguished *Owens* and its progeny – the very cases that formed the survey the panel conducted – and contemplated that equitable relief was still available: "Despite eliminating reimbursement as an available remedy, however, both *Ellis* and *Owens* left intact the availability of restitution as appropriate equitable relief." *Id.* at 1237. This was the very same defendant in possession standard used by each and every other circuit court of appeal that has decided this issue. Quite significantly, by distinguishing *Owens* and its progeny, *Foster* was signaling the fact that a different rule applied to *Knudson* type claims.

Given this background, *Foster* is significant because it is the first Ninth Circuit decision to actually acknowledge that *Knudson*'s defendant in possession standard exists. Instead of grappling with this key observation in *Foster*, the panel simply ignores it, satisfying itself that the black letter holding was sufficient to dictate the rule *Foster* supposedly announced. Were it to apply that standard here, reversal of the district court's dismissal would be warranted since CHWT did state a claim in its First Amended Complaint. Among other things, it alleges that one of the attorney defendants is holding $30,000 in its client trust account, thus making it a defendant in possession of certain specific funds.

## II. The Court Should Grant The Petition To Resolve A Conflict Between Ninth Circuit Cases And This Court's Decision In *Harris Trust & Savings Bank v. Salomon Smith Barney*, 530 U.S. 238, 251 (2000)

In the process of arriving at this conclusion, the Ninth Circuit distinguished – and also misread – *Harris Trust*, a case which actually stands for the proposition that there is

no wrongdoing requirement in a constructive trust, for the proposition that it in fact does. It erroneously explained that *Harris Trust* does in fact contain such a requirement because the facts in *that particular case* involved tainted assets. While *Harris Trust* may have addressed those particular facts in that particular case, it can hardly be said that the facts of a particular case control the general principles it announces, which is exactly what the Ninth Circuit did. In fact, *Harris Trust* did not in any way suggest that wrongdoing was an element in obtaining constructive trust relief. Indeed, in referring to Dobbs' treatise, the Court noted that "the constructive trust is based on property, not wrongs." As this simple sentence reflects, a constructive trust does not, contrary to the view of the Ninth Circuit in *Owens*, require any wrongdoing whatsoever. The full passage of Dobbs' treatise provides:

> Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries in cases of fraud. But this is a misconception. *The constructive trust is based on property, not wrongs*. It proceeds on the notion that the defendant has legal title but that the plaintiff has the superior moral or equitable claim. This misconception probably arises in part from the trust language itself. The constructive trust terminology, like quasi-contract terminology at law, is an analogy only, but if taken literally can suggest a trust and hence a fiduciary. It also probably arises in part from the fact that in a few special cases, wrongdoing is relevant to the constructive trust.[6] At any rate, ***the constructive***

6. Dobbs, on pages 598 and 599 of his treatise, describes these very exceptional cases as those which "the court cannot find unjust (Cont'd)

***trust is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing.***[7]

*See also Health Cost Controls*, 187 F.3d at 711 (Judge Posner discussing how equity no longer recognizes principle that constructive trust is limited to breach of trust). This passage and its adoption by *Harris Trust* clearly exposes the folly of the panel's view that *Harris Trust* actually endorsed the continued vitality of the Ninth Circuit's "ill-gotten gains" standard.[8] Further buttressing this point are other sister courts

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(Cont'd)
at all unless there is wrongdoing." One example of such a case is based on the Statute of Frauds. In such an instance, a plaintiff, who would normally be barred from enforcing an oral contract, would not be allowed to circumvent the requirement of a writing simply by suing on a theory of unjust enrichment. When this occurs, a court, in order to preserve the integrity of the Statute of Frauds, will impose a constructive trust only when the conduct complained of is accompanied by fraud. As this discussion and example demonstrate, the case here is not one which would be exempted from the general rule that no wrongdoing is required to impose a constructive trust.

7. *See also The Future of Private Pensions: Proceedings of the 2001 Annual Meeting of the Association of American Law Schools, Section on Employee Benefits*, 5 Empl. Rts. & Employ. Policy J. 351, 381 ("*Harris Trust* probably does mean that the extremely restrictive view of equitable relief which the Ninth Circuit has taken is overly narrow"). *See also* Lisa N. Bleed, *Enforcing Subrogation Provisions As "Appropriate Equitable Relief' Under ERISA Section 502(a)(3)*, 35 U.S.F.L. Rev. 727, 743 n. 124 (2001) (*Harris Trust* suggested wrongdoing not required under ERISA).

8. At least one other district court in the Ninth Circuit has recognized the demise of the *Owens Trilogy*. In *Great West Life v. Perkins*, Case No. C:02-5294-FDB (W.D. Wash. 2002), the court awarded the plan there provisional relief. In doing so, it expressly
(Cont'd)

that have held that *Harris Trust* does not contemplate a wrongdoing requirement in an action based on a constructive trust theory:

> Contrary to Rowland's assertions, a plaintiff is not necessarily required to prove wrongdoing by the defendant in order to obtain relief through imposition of a constructive trust or an equitable lien. *Id.* at 597-98. "The constructive trust is based on property, *not wrongs*." *Id.* at 597 (emphasis added). "In the constructive trust case the defendant has legal rights in something that in good conscience belongs to the plaintiff. . . . The defendant is thus made to transfer title to the plaintiff who is, in the eyes of equity, the true 'owner.'" *Id.* at 587. "The equitable lien uses similar ideas to give the plaintiff a security interest in the property or to give the plaintiff only part of the property rather than all of it." *Id.* at 588.

*Rowland*, 367 F.3d at 649. *See also Wellmark v. Deguara*, 2003 U.S. Dist. LEXIS 5900, *1, *15 (S.D. Ia. 2003) (*Harris Trust* "did not limit recovery under Section 502(a)(3) to unlawfully transferred property").

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(Cont'd)

noted that *Harris Trust*'s observation that the constructive trust was about property not wrongs had overruled this court's short-lived ill-gotten gains standard.

## III. The Court Should Grant The Petition To Resolve The Issue Of Whether A Dismissal Of A Reimbursement Action Is One On The Merits Or One For Lack Of Subject Matter Jurisdiction For The Purpose Of Deciding Whether A Court Has Subject Matter Jurisdiction To Award Attorneys Fees To A Prevailing Defendant

Section 502(g) of ERISA provides that "(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g). It is axiomatic and well beyond dispute that a court must first invoke ERISA jurisdiction in order for this fee-shifting provision to apply. *Knight v. Knight*, 207 F.3d 1115, 1117 (9th Cir. 2000). Lacking such jurisdiction, a court also lacks jurisdiction in which to award fees under that section. *Id.*

In its decision affirming the dismissal of CHWT's reimbursement action, the Ninth Circuit awarded fees under Section 502(g), thereby implicitly holding that it had jurisdiction under ERISA. This implicit basis for its holding conflicts with the decisions of the Third, Fifth, and Seventh Circuits which have all held that a court's dismissal of reimbursement cases under Section 502(a)(3) of ERISA are based on jurisdictional, not substantive grounds. *See Sackman*, 86 Fed. Appx. at 484 ("In doing so in the case before us, it becomes apparent that the District Court lacked *subject matter jurisdiction* over the unjust enrichment claim that the Fund asserted under § 502(a)(3) of ERISA") (emphasis supplied) (Third Circuit); *Bombardier*, 354 F.3d at 362 ("We affirm the district court's exercise of *subject matter jurisdiction* based on ERISA § 502(a)(3) over the

Plan's action for a constructive trust because it is equitable in nature") (emphasis supplied) ) (Fifth Circuit); *Varco*, 338 F.3d at 685 ("the only remaining issues that survive on appeal are whether the district court had *subject matter jurisdiction* over the Committee's claims and, if so, whether the Committee must reimburse Varco for her payments to her attorney pursuant to Illinois common fund doctrine") (emphasis supplied) (Seventh Circuit).

In fact, the Ninth Circuit's decision even conflicts with other prior Ninth Circuit authority on this point. For instance, in *FMC Corp. v. Owens*, 122 F.3d 1258, 1262 (9th Cir. 1997), the first reimbursement case that the Ninth Circuit decided, the court held that a dismissal of a reimbursement action was a jurisdictional dismissal and not one on the merits. Perplexingly, the Ninth Circuit proceeded to split on this issue since then, *cf. Westaff v. Arce*, 298 F.3d 1164 (9th Cir. 2002) (merits) and *Cement Masons Health and Welfare Trust v. Stone*, 197 F.3d 1003, 1007-08 (9th Cir. 1999) (merits) with *Reynolds Metal v. Ellis*, 202 F.3d 1246, 1248 n.2 (9th Cir. 2000) (noting either is appropriate), thus causing even more disarray on this issue in the circuit itself. Given this irreconcilable inter- and intra-circuit conflict, this Court should grant the petition and review the errant decision of the Ninth Circuit below.

## IV. The Court Should Grant The Petition To Resolve The Issue Of Whether The "Special Circumstances" Rule Applies In Cases Where A Plan Seeks To Enforce Its Reimbursement Clause Under Section 502(a)(3) Of ERISA

Under ERISA's fee shifting provision, courts have uniformly applied a five factor test, *see e.g.*, *Hummell v. S.E. Rykoff*, 634 F.2d 446, 452-53 (9th Cir. 1980), as a guide to determine whether fees are appropriate. These factors require the court to consider, among other things, the bad faith (or absence thereof) of the losing party, the relative merits of the parties, and whether the non-prevailing party can pay an award of fees. *Id.* In its decision, the Ninth Circuit applied an exception to that rule – the "special circumstances" rule – announced in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984). That exception applies in cases where a participant, as a plaintiff, prevails in a suit for benefits enforcement against a plan. *Id.* In such a case, the "special circumstances" rule requires a court to award fees to the participant unless "special circumstances" dictate otherwise. *Id.* The reason underlying this rule is to vindicate the purposes of ERISA, "those purposes being to protect employee rights and to secure effective access to federal courts." *Id.*

In applying this rule, especially to a case where the participant was the defendant in the case, the Ninth Circuit parted company with at least eight circuit courts of appeal. *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 970 (8th Cir. 2002) (cataloging cases from the First, Third, Fourth, Fifth, Sixth, Eighth (including *Martin*), Eleventh, and D.C. Circuits that reject the "special circumstances" rule; *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir. 1996); *Eddy v. Colonial Life Ins. Co. of Am.*, 313

U.S. App. D.C. 205, 59 F.3d 201, 205-06 (D.C. Cir. 1995); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1030 (4th Cir. 1993); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1274 (3d Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1302 (6th Cir. 1991); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980).) It also, however, aligned itself with the Seventh Circuit on this issue. *Little v. Cox's Supermarkets*, 71 F.3d 637, 644 (7th Cir. 1995) (noting that courts can use either the five-factor test or a "modest presumption" and that under either formulation, "the 'bottom-line question' is the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent"). This is clearly a significant issue since the prospect of taking on a fee award, an award which sometimes may greatly exceed the amount in controversy, will deter the fulfillment of fiduciary duties in abiding by the terms of a plan. It will also, in turn, prevent recovery of monies which would expand the assets of a plan. In addition, the possibility of a fee award may very well convince plans to completely abandon reimbursement claims and simply compel them to refuse to cover injuries caused by third parties. This would then result in the unspeakable prospect of participants fending for themselves when they are injured by third parties.

And once again, in applying this rule, the Ninth Circuit was not faithful to its own prior pronouncements with respect to this rule. For example, it applied the rule to a much different set of facts envisioned by *Smith* since the instant case, unlike *Smith*, involved a plan plaintiff suing a participant defendant. In its decision, the panel offered almost no analysis on the "special circumstances" issue and went on to "automatically" award the appellees fees in this case without applying the five factor test set forth in *Hummell*.

This blind application of *Smith*'s rule was based on the panel's view that "[a]lthough it was certainly proper for the district court to employ a *Hummell* analysis [ ] the court paid little heed[9] to the principles underlying the special "circumstances doctrine." This view strays from Ninth Circuit precedent on several independent grounds.

In the first place, the panel essentially awarded fees to the appellees because they prevailed on the federal theory. This was clearly error because "[a]lthough [appellees are] the prevailing part[ies], this factor alone is not a sufficient basis on which to conclude that the district court abused its discretion in denying [them] attorney's fees." *Foster*, 332 F.3d at 1239. Furthermore, the appellees did not "prevail" in any sense of the word since they will potentially lose on the state claims. These claims are even stronger than the federal theory since they do not require any showing of a defendant in possession of specific monies, and they carry punitive damage remedies that the federal theory does not. As such, the appellees have not "prevailed" in the least.

In addition, the panel had no discretion to dispense with the *Hummell* analysis in favor of the special circumstances rule. This is because *Hummell* is the mandatory test for attorneys fees and ***must*** be applied in any fee issue

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9. The panel's decision fantastically notes that the district court judge "paid little heed" to the special circumstances rule. As clearly evidenced by the judge's ruling, he devoted more than one page of a single-spaced order to rejecting application of that rule. (Appendix C.) In stark contrast, a prior panel of the Ninth Circuit used but one paragraph in its rejection of that rule in *Foster*. Thus, if the district court judge "paid little heed" to that rule in his decision below, *Foster*, in the view of the panel, must have given the special circumstances rule no heed whatsoever.

under ERISA: "[i]n making its decision the District Court ***must*** analyze the five *Hummell* factors." *Cline v. Industrial Maintenance Eng'g & Contr. Co.*, 200 F.3d 1223, 1235 (9th Cir. 2000) (emphasis added). As noted even in *Smith* itself, this is true even where the special circumstances rule applies. Consistent with *Smith*'s use of *Hummell* are other reimbursement cases that employed that very same approach. For instance, in *Foster*, the court considered and rejected the use of the "special circumstances" rule. *Foster*, 332 F.3d at 1239-40. In refusing to apply this rule, it then correctly proceeded to apply the five *Hummell* factors in ultimately denying fees to the defendant participant in that case.

Well-established Ninth Circuit law only buttresses this point. For example, in *Kim v. Fujikawa*, 871 F.2d 1827 n.10 (9th Cir. 1988), the Ninth Circuit noted that "in some situations" its discretion in utilizing the five factor test is limited. The situation *Fujikawa* referred to was one where, unlike this case, a participant was suing for benefits. Because *Fujikawa* was not a benefit enforcement matter, the Court ruled that "such is not the situation in this case." Most significantly, it proceeded to apply *Hummell*'s five factor test and denied fees to a prevailing (counter) defendant. This common sense construct has been applied by more recent Ninth Circuit cases that did involve benefit enforcement claims and a recognition of *Smith*'s "special circumstances" rule. *McElwaine v. U.S. West*, 176 F.3d 1167, 1172-73 (9th Cir. 1999).

This approach is consistent with the reasoning employed in *Smith*. There, the court explained the unique factual scenario in which the rule applied: "a plan participant or beneficiary [ ] prevails in *his* suit under Section 1132 to *his* rights under *his* plan." *Id.* at 589 (emphasis supplied). In this

case, the participant and the beneficiaries were, contrary to the panel's errant description of this matter, hardly trying to secure any rights of theirs under the plan. Rather, as noted by Judge King below:

> Defendants did not seek to benefit other ERISA participants and beneficiaries of the plan. By retaining the money expended by [CWHT] on their behalf while receiving funds from the underlying state court settlement, [defendants] have actually reaped a windfall at the expense of all . . . Ultimately the legal question decided in this case will benefit only a subset of participants and beneficiaries. Moreover, as discussed above, Defendants did not seek to vindicate a right under ERISA as much as they sought to secure a windfall from [CHWT's] inability to obtain reimbursement.

The wisdom of Judge King's conclusion on that point is borne out by the purposes of ERISA and the special circumstances rule, "those purposes being to protect employee rights and to secure effective access to federal courts." *Smith*, 746 F.2d at 589. Simply put, the appellees sought to serve neither of these purposes since they were not attempting to protect any interests other than their own and, as defendants who had absconded with money rightfully belonging to CHWT, they hardly were denied "effective access to federal courts." Quite significantly, neither the panel itself nor the appellees have cited to one case to support their proposition that the "special circumstances" rule applies in cases like this where the plan is suing to enforce the terms of its plan. In such a case, not only is such a rule inapplicable, *Hummell* must applied.

Finally, in *Foster*, the court noted that any application for fees must be analyzed through the prism of ERISA's remedial purposes. In *Foster,* it had concluded that because the participant there had received training for free, he was not in a position to invoke these remedial purposes or the special circumstances rule. As in *Foster*, the participant here received medical benefits without having to pay them back. As a result, he too is not in a position to invoke ERISA's remedial purposes or the special circumstances rule.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED SEPTEMBER 15, 2004

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 02-57183, 03-55296, 03-55312

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff-Appellant,

v.

Timothy VONDERHARR; Karen Vonderharr, minor by her guardian ad litem, Timothy Vonderharr; Lauren Vonderharr, minor by her guardian ad litem Timothy Vonderharr; Sara Vonderharr, minor by her guardian ad litem, Timothy Vonderharr; Charles R. Weldon Law Offices; Does, Ito X, inclusive; McClellan & Associates, a Professional Corporation,

Defendants-Appellees.

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Carpenters Health and Welfare Trust for Southern California,

Plaintiff-Appellee,

v.

Timothy Vonderharr; Karen Vonderharr, minor by her guardian ad litem, Timothy Vonderharr; Lauren Vonderharr, minor by her guardian ad litem Timothy Vonderharr; Sara Vonderharr, minor by her guardian ad litem, Timothy Vonderharr; McClellan & Associates, a Professional Corporation,

Defendants-Appellants.

*Appendix A*

Carpenters Health and Welfare Trust for Southern California,

Plaintiff-Appellee,

v.

Timothy Vonderharr,

Defendant,

and

Charles R. Weldon Law Offices,

Defendant-Appellant.

Argued Feb. 5, 2004

Submitted and Filed Sept. 15, 2004

**OPINION**

THOMAS, Circuit Judge:

Carpenters Health and Welfare Trust for Southern California (the "Trust") appeals the dismissal of its action seeking reimbursement of medical benefit payments from a personal injury recovery obtained by plan participant Timothy Vonderharr and his family. We affirm in part, vacate in part, and remand.

I

This action arises out of an automobile accident in December, 1998, in which four members of the Vonderharr family were injured. Lauren Vonderharr, age 11, suffered a

permanent brain injury in the crash and incurred most of the family's medical bills. The Trust is an employee benefit plan governed by Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3). It provides medical benefits for active and retired carpenters covered by collective bargaining agreements maintained between the Southwest Regional Council of Carpenters and construction contractors in the southwest United States. Timothy Vonderharr is an active carpenter covered by the collective bargaining agreement and is a Trust plan participant. Pursuant to the plan, the Trust paid $155,224.43 in medical expenses for the Vonderharrs. Prior to paying the Vonderharrs' claims, the Trust required the Vonderharrs and Weldon to sign a document giving the Trust a lien on any recovery they obtained from a third party. This requirement was contained in the Summary Plan Description and stated that:

> If you or one claiming through you . . . has received or may receive payments, from any source whatsoever, in whole or in part for injury or illness for which benefits are otherwise provided by the Trust, you and/or the one claiming through you are required to reimburse the Trust from the net proceeds of these payments, up to the actual amount of benefits paid by the . . . Plan(s) for expenses arising from that injury or illness. You and those acting for you will be required to sign documents to carry out the Trust's reimbursement rights. If you fail to sign these documents or otherwise to fulfill the reimbursement obligation, the Trust may refuse

> to extend any benefits that would otherwise be provided by the Trust for the injuries or illness involved.

Following the accident, the Vonderharrs filed suit against the driver of the other vehicle and Ford Motor Company. In March, 2001, the Orange County Superior Court approved a $30,000 settlement agreement reached between the Vonderharrs and the other driver. The Trust alleges that the Vonderharrs settled their action against Ford in April, 2002.

In response to inquiries from the Trust, the Vonderharrs communicated their view through their counsel that the contractual reimbursement provisions were unenforceable under ERISA. After further negotiations proved unsuccessful, the Trust filed an action seeking, among other relief, a temporary restraining order enjoining any distribution of settlement proceeds. The district court denied the request for a temporary restraining order, and subsequently granted the Vonderharrs' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court denied the Vonderharrs' request for attorneys' fees. The Trust appeals the dismissal of the action; the Vonderharrs cross-appeal the order denying attorneys' fees. We review a dismissal for failure to state a claim pursuant to FRCP 12(b)(6) *de novo*. *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003).

II

The Supreme Court has often observed that "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee

benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002) (internal quotation marks and citations omitted). As part of its expansive regulation of employee benefit plans, ERISA provides for a federal cause of action for civil claims to enforce the provisions of an ERISA plan. In so providing, "Congress's primary goal was to replace the patch-work quilt of state law with a uniform body of federal law and to provide litigants with access to federal courts to enforce their newly created rights." Schneider and Freedman, *ERISA: A Comprehensive Guide* (2d ed. 2002), § 8.01, p. 8-3. Thus, courts have construed extra-statutory remedies available under ERISA quite narrowly. As the Supreme Court has stated, "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate directly." *Id.* (internal quotation marks and citations omitted) (emphasis in original).

To make an ERISA civil enforcement claim, "a plaintiff must fall within one of ERISA's nine specific civil enforcement provisions, each of which details who may bring suit and what remedies are available." *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1247 (9th Cir. 2000). In this case, the Trust filed its action pursuant to the third enumerated category, which provides that a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(3).

*Appendix A*

The Supreme Court has construed the phrase "appropriate equitable relief" narrowly, noting that such equitable relief is limited to redressing violations or enforcing provisions of ERISA or an ERISA plan. *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 253-54, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993). The Supreme Court has eschewed a compensatory monetary award as an available ERISA remedy and held that the equitable relief referenced in ERISA is limited to those "categories of relief that were *typically* available in equity." *Id.* at 256. ERISA does not provide a cause of action for legal actions for monetary damages disguised as suits in equity. *Great-West Life*, 534 U.S. at 215-16. Indeed, the Supreme Court has drawn a "fine distinction" between those actions that are truly legal in nature and those that constitute allowable "appropriate equitable relief" under ERISA, regardless of the label attached to the claim. *Id.* at 214-15.

We have also adhered to this philosophy. In *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517 (9th Cir. 1993), we held that only traditional forms of equitable relief were available under ERISA. We explained that "[i]t makes no difference that the Watkinses' claim is equitable in nature;" rather, the critical factor was the "substance of the remedy sought (*i.e.*, injunction versus damages) rather than the label placed on that remedy." *Id.* at 1527-28 n.5. In *McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956, 960 (9th Cir. 1995), we similarly held that "equitable relief in the form of recovery of compensatory damages is not an available remedy" under ERISA.

*Appendix A*

In *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997), we held that the equitable remedy of "equitable reimbursement" was not available under ERISA, because what the plaintiff was truly seeking was "reimbursement for money that Owens rightfully received under the Plans." *Id.* at 1261. We explained that: "Essentially, FMC seeks a breach of contract claim for monetary relief, albeit under its classification of 'equitable reimbursement.'" *Id.* "Such monetary relief," we noted, "is not available under section 1132(a)(3)." *Id.* We noted that an action to impose a constructive trust was an allowable ERISA remedy. However, we observed that "a constructive trust is born of some form of ill-gotten gain of another's property." *Id.* In addition to that traditional requirement, we stated that "in order to allow a claim for constructive trust under ERISA, a breach of fiduciary duty must be present." *Id.*

In *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F.3d 1003 (9th Cir. 1999), we considered a lawsuit filed by a health plan to recover medical expenses paid on behalf of a plan participant from proceeds recovered on a wrongful death claim. The plan sought restitution, declaratory relief, and an injunction requiring enforcement of the contractual lien. We held that such remedies were not permitted under ERISA, specifically noting that the remedy of restitution was limited to cases involving "money obtained through fraud or wrongdoing." *Id.* at 1006-07 (internal quotation marks omitted). We rejected the suggestion that the fact that the plan sought enforcement of a lien altered the analysis, stating that "[e]nforcement of a lien, however, is nothing more than a mechanism to enforce, or to obtain the equivalent of, a damage remedy." *Id.* at 1007.

*Appendix A*

In *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000), Reynolds Metal sought reimbursement of the medical expenses that employee Ellis received from a third party settlement resulting from an accident. Reynolds conceded that its claims were foreclosed by *Owens*, but argued that *Owens* conflicted with *Mertens* in its limitation of available ERISA remedies. We firmly rejected that contention, observing that *Owens* was based on *Mertens* and did not preclude all claims for relief, but appropriately limited restitution and constructive trust remedies to those situations in which fraud or wrong-doing is shown. *Id.* at 1249. We reiterated the rule that "actions by ERISA fiduciaries seeking to enforce an ERISA plan's contractual reimbursement provisions do not fall within § 1132(a)(3)." *Id.*

In *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002), the plaintiff sought reimbursement for medical benefits through the mechanism of a claim for declaratory relief and specific performance. We rejected this attempt to circumvent ERISA's restrictions, holding that "Westaff [was] seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim." *Id.* at 1166. We also noted that the fact that the money had been placed in an escrow account and remained specifically identifiable made no difference to the result. *Id.* at 1167.

Recently, we reiterated our holding under a slightly different factual scenario in which the ERISA plan sought to recover funds it had expended for training. *Honolulu Joint Apprenticeship & Training Cmte. of United Assoc. Loc. Un. No. 675 v. Foster*, 332 F.3d 1234 (9th Cir. 2003). However, the rationale was the same: The remedy sought was

essentially an action at law to remedy a breach of a legal obligation, rather than a true suit in equity. *Id.* at 1238.

In sum, to state a cause of action under § 1132(a)(3), an ERISA plan must "demonstrate (1) that it is an ERISA fiduciary, and (2) that it is seeking equitable, rather than legal, relief." *Reynolds Metals*, 202 F.3d at 1247. "[A]ctions by ERISA fiduciaries seeking to enforce an ERISA plan's contractual reimbursement provisions do not fall within § 1132(a)(3)." *Id.* at 1249. The remedies of restitution and the imposition of a constructive trust are available under § 1132(a)(3), but only as true equitable remedies and provided the traditional requirements of fraud or wrong-doing are satisfied. *Id.* at 1248.

III

In this case, the Trust filed a complaint seeking reimbursement under § 1132(a)(3) from the proceeds of third party tort settlements for money the Trust paid on behalf of the Vonderharrs to medical care providers pursuant to the terms of the employee health benefit plan. After dismissal of the first complaint, the Trust filed an amended complaint seeking the imposition of "a constructive trust and/or equitable lien" and declaratory relief.

Relying on the solid wall of authority to which we have referred, the district court appropriately dismissed the complaint as seeking relief that was not available under ERISA. On appeal, the Trust argues that *Owens*, *Cement Masons*, *Reynolds Metals*, and their progeny have all been overruled by the Supreme Court in *Great-West Life*, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002) and *Harris*

*Trust v. Salomon Smith Barney*, 530 U.S. 238, 147 L. Ed. 2d 187, 120 S. Ct. 2180(2000). The Trust is wrong.

*Great-West Life* buttressed rather than overruled our holdings. Indeed, *Great-West Life* affirmed our unpublished opinion which the Supreme Court characterized as holding "that judicially decreed reimbursement for payments made to a beneficiary of an insurance plan by a third party is not equitable relief and is therefore not authorized by § 502(a)(3)." 534 U.S. at 208.

As in this appeal, the plan at issue in *Great-West Life* included a reimbursement provision, which specifically provided for the plan's right to recovery of benefits paid from a third party and also provided for a lien on proceeds from tort recoveries. The plan in *Great-West Life* filed an action seeking injunctive and declaratory relief under § 502(a)(3) to enforce the reimbursement provision of the plan by requiring the payment of proceeds recovered from third parties. *Id.* Consistent with its prior authority and with our precedent, the Supreme Court held that this type of action was not permissible under ERISA. *Id.*

Nor does *Harris Trust* overrule our Circuit precedent. *Harris Trust* involved the question of whether § 1132(a)(3) allowed "a suit against a nonfiduciary 'party in interest' to a transaction barred by § 406(a)." 530 U.S. at 241. The Court held that it did. *Id.* In doing so, the Court referenced "the analogous situation of property obtained by fraud." *Id.* at 250. As the Court observed:

> It also bears emphasis that the common law of trusts sets limits on restitution actions against

> defendants other than the principal "wrongdoer." Only a transferee of ill-gotten trust assets may be held liable, and then only when the transferee (assuming he has purchased for value) knew or should have known of the existence of the trust and the circumstances that rendered the transfer in breach of the trust.

*Id.* at 251.

The Court concluded that "an action for restitution against a transferee of tainted plan assets satisfies the 'appropriateness' criterion" under § 1132(a)(3), noting that *Mertens* had previously indicated that "the 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits." *Id.* at 253.

In sum, neither *Harris Trust* nor *Great-West Life* overruled our circuit precedent. Indeed, *Great-West Life* was a case affirming our circuit and referenced one of the cases that the Trust claims it overruled.

The actions asserted by the Trust are nothing more than garden-variety legal claims for contractual restitution that are not cognizable under ERISA. Thus, the district court was entirely correct in its dismissal of the Trust's ERISA claims.

## IV

The district court dismissed the Trust's state law claims "as completely preempted by ERISA" because the "state claims asserted related directly to the administration of an

ERISA plan and thus fall within the preemption provision." As we have noted repeatedly, "ERISA contains one of the broadest preemption clauses ever enacted by Congress." *PM Group Life Ins. v. Western Growers Assur. Trust*, 953 F.2d 543, 545 (9th Cir. 1992) (quotation omitted). However, we have recently held that some common law claims for reimbursement may survive ERISA's preemptive force. *Providence Health Plan v. McDowell*, 361 F.3d 1243 (9th Cir. 2004). Because the district court did not have the benefit of *Providence Health Plan* when it considered the state law claims at issue in this case, we remand for the district court's reconsideration of the state law claims in light of *Providence Health Plan*. In doing so, we express no opinion on the merits of the question.

V

In ERISA cases, "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). As we noted in *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), "[t]his section should be read broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under his plan, should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 589. Although it was certainly proper for the district court to employ a *Hummell* analysis, *see Westaff*, 298 F.3d at 1167, the court paid little heed to the principles underlying the "special circumstances" doctrine. *See Nelson v. EG & G Energy Measurements Grp., Inc.*, 37 F.3d 1384, 1392 (9th Cir. 1994); *McConnell v. MEBA Medical & Benefits Plan*, 778 F.2d 521, 525-26 (9th Cir. 1985).

The ERISA plan beneficiaries were merely attempting to secure and enforce their plan's medical benefit unencumbered by the extra-statutory conditions of the reimbursement provisions; the Trust then subjected them to this burdensome litigation. We thus see no "special circumstances" that render the award of attorney fees to the plan beneficiaries in this case "unjust." Consequently, we reverse the district court's order denying attorneys' fees and remand in order for the district court to determine the appropriate fees to be awarded once all claims are determined.

## VI

We affirm the district court's dismissal of the Trust's federal claims and remand for reconsideration of the Trust's state claims. We reverse the district court's denial of attorneys' fees and remand the question of the appropriate sum of those fees to be determined by the district court.

**AFFIRMED IN PART; VACATED AND REMANDED IN PART.**

## APPENDIX B — CIVIL MINUTES-GENERAL OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JANUARY 16, 2003

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES-GENERAL**

**Case No.:** CV 02-04920-GHK(PJWx)

**Date:** January 16, 2003

**Title:** **Carpenters Health & Welfare Trust for Southern California v. Timothy Yonderharr, et al.**

**DOCKET ENTRY**

**PRESENT: Hon. *George H. King*, United States District Judge**

| | |
|---|---|
| *Beatrice Herrera* | *None* |
| Deputy Clerk | Court Reporter |

**ATTORNEYS PRESENT FOR PLAINTIFFS:**

None

**ATTORNEYS PRESENT FOR DEFENDANTS:**

None

*Appendix B*

**PROCEEDINGS: Defendants' Motion for Attorneys Fees**

This matter is before the court on the above-titled motion. This motion is appropriate for resolution without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. After fully considering the briefs and papers pertaining to this matter, we rule as follows:

## I. BACKGROUND

On June 21, 2002, Plaintiff Carpenters Health and Welfare Trust for Southern California ("Plaintiff") filed its original Complaint seeking reimbursement and declaratory relief under the Employee Retirement Income Security Act ("ERISA") and asserting five state law claims. The Complaint named eight defendants: four members of the Vonderharr family (collectively, the "Vonderharrs"); the Vonderharrs' former attorney, Charles Weldon; their present counsel, McClellan & Associates ("McClellan"); Ford Motor Company ("Ford"); and Ford's counsel, Yukevich & Sonnett ("Yukevich").

On July 18, 2002, defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion was transferred to Judge Hupp for his consideration. On August 19, 2002, Judge Hupp granted defendants' motion, dismissing all claims against Ford and Yukevich without leave amend, dismissing Plaintiff's state law claims against the Vonderharrs, Weldon, and McClellan without leave to amend, and dismissing Plaintiff's ERISA claims against the Vonderharrs, Weldon, and McClellan with leave to amend.

*Appendix B*

On August 30, 2002, Plaintiff filed a First Amended Complaint ("FAC") against the Vonderharrs, Weldon, and McClellan asserting claims for a constructive trust/equitable lien and declaratory relief. On September 9, 2002, McClellan and the Vonderharrs filed a motion to dismiss Plaintiff's FAC. Also on September 9, 2002, Defendants McClellan and the Vonderharrs filed a motion seeking interim attorneys fees on behalf of themselves and seeking attorneys fees for their defense of Ford and Yukevich.

On November 14, 2002, we granted Defendants' motion to dismiss the FAC. By a separate minute order issued on the same day, we denied Defendants' motion for attorneys fees incurred in defense of Ford and Yukevich. We also denied their motion for interim attorneys fees incurred on their own behalf without prejudice pending their filing of a unified attorneys fees motion.

On November 29, 2002, the Vonderharrs and McClellan filed the present motion for attorneys fees. Weldon joined in the motion on December 6, 2002.

## II. DISCUSSION

ERISA § 502(g)(1) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). When considering a motion for attorneys fees, we must consider the five factors enumerated in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). These factors are:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties

> to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

*Id.* at 453. No one of these factors is decisive, and some may not be relevant in a given case. *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984); *Carpenters Southern California Administrative Corp. v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984). Nevertheless, when applying the foregoing *Hummell* factors, we must exercise our discretion with the purposes of ERISA in mind. *Smith*, 46 F.2d at 589. The purposes of ERISA are "to protect employee rights and to secure effective access to federal courts." *Id.* (citing 29 U.S.C. § 1001(b)).

Defendants contend that Smith created a "special circumstances" rule, whereby "a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under his plan, should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 589 (quoting *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980)). From this, Defendants argue that, whenever an ERISA participant prevails in an ERISA action with his or her plan, the court should not engage in the *Hummell* analysis. *See Nelson v. EG & G Energy Measurements Group*, 37 F.3d 1384, 1392 (9th Cir. 1994).

Defendants, however, stretch the "special circumstances" rule too far. Smith held that, "[a]s a general rule, ERISA employee plaintiffs should be entitled to a reasonable attorney's fee if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 746 F.2d at 589 (internal quotations omitted). The cases upon which Defendants rely for the application of the "special circumstances" rule involved ERISA plaintiffs seeking benefits from their respective ERISA plans. *See, e.g. id.* at 588-89; *McElwaine v. US West, Inc.*, 176 F.3d 1167, 1169 (9th Cir. 1999); *Kaves v. Pacific Lumber Co.*, 51 F.3d 1449, 1453 (9th Cir. 1995); *Nelson v. EG & G Energy Measurements Group*, 37 F.3d 1384, 1386 (9th Cir. 1994); *McConnell v. MEBA Medical & Ben. Plan*, 778 F.2d 521, 523-24 (9th Cir. 1985).

Here, Defendants are not seeking benefits from their ERISA plan. They are merely defending a claim for reimbursement brought by Plaintiff. The policy behind the "special circumstances" rule is that ERISA seeks "to protect employee rights and to secure effective access to federal courts." *Smith*, 746 F.2d at 589. ERISA, however, does not provide employees with a right to be free from a plan's reimbursement provision. Rather, as our November 14, 2002 order suggests, ERISA simply lacks a mechanism by which a plan can enforce such a provision. Consequently, by defending this action, Defendants are not seeking to protect their rights under ERISA; they are seeking safe harbor in Plaintiff's inability to obtain reimbursement.

In any event, the "special circumstances" rule is not separate and distinct from the *Hummell* analysis. Rather than

being a complete substitute for the *Hummell* analysis, as Defendants suggest, the "special circumstances" rule should act as a guide in our application of the *Hummell* factors. In fact, many of the cases upon which Defendants rely for their application of the "special circumstances" rule do, in fact, engage in a discussion of the *Hummell* factors. *See, e.g. Smith*, 746 F.2d at 590-91; *McElwaine*, 176 F.3d at 1172; *McConnell*, 778 F.2d at 525-26. Although Nelson held that a discussion of the factors enumerated in *Hummell* was unnecessary when it is evident from the district court's order that "the plaintiffs prevailed completely on the sole issue in question, received the entire relief sought, and resolved a significant legal question," 37 F.3d at 1392, nothing in the case law prohibits us from engaging in a *Hummell* discussion. In light of the foregoing, we choose to employ the *Hummell* factors in considering the instant motion.

### A. *The Degree of Plaintiff's Culpability or Bad Faith*

Here, Defendants have provided no evidence of Plaintiff's bad faith or culpability. Plaintiff brought its claims against Defendants believing that relief might have been available on a theory of constructive trust in light of the Supreme Court's decision in *Great-West-Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Under the circumstances, we cannot conclude that these claims were brought in bad faith. *Knudson* noted that "a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. Plaintiff has relied

upon this language as an affirmative endorsement of the constructive trust theory as a mechanism for enforcing an ERISA reimbursement provision. Although we ultimately rejected Plaintiff's claims, we cannot characterize them as being brought in bad faith.

Nor can we find Plaintiff's assertion of state law claims to be evidence of bad faith. Plaintiff relied on a footnote in *FMC Corp. v. Owens*, 122 F.3d 1258 (9th Cir. 1997). After concluding that the plan's claim for reimbursement was essentially a breach of contract claim for monetary relief and, thus, unavailable under ERISA § 503 (a) (3), the *Owens* court noted that the plaintiff would "have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by [the defendant]." *Id.* at 1262 n.2. At least one California court has noted that "[t]hese remarks [in the *Owens* footnote] presuppose that such a state court action would not be preempted by ERISA." *Carpenters Health & Welfare Trust Fund v. McCracken*, 83 Cal. App. 9th 1365, 1371 (1st Dist. 2000). In light of the foregoing, we do not believe Plaintiff has asserted its state law claims in bad faith.

Defendants also argue that Plaintiff used sham pleadings in its original complaint. In the original complaint, Plaintiff alleged that Defendants gained, or were in possession of, Plaintiff's funds by "fraud, accident, mistake, undue influence, violation of trust or other wrongful act." *See* Compl. ¶¶ 16, 26. Defendants allege that Plaintiff then deleted those allegations from the FAC after Judge Lourdes G. Baird ruled that the Vonderharrs did not obtain Plaintiff's funds by fraud or wrongdoing, *see* Order Denying Pl.'s

*Appendix B*

Ex Parte Request for TRO, June 28, 2002, at 7, and after Judge Hupp noted that no fraud or ill-gotten gains were alleged in the original complaint. *See* Order Granting Defs.' Mot. to Dismiss & Denying Pl.'s Mot. for Reconsid., August 21, 2002, at 3. It is clear how the allegations in the original complaint, or their deletion from the FAC, demonstrate bad faith on Plaintiff's part. Nor can we determine that Plaintiff acted in bad faith by praying for punitive damages in its original complaint.

Essentially, Plaintiff sought to recoup money expended on behalf of one family of participants and beneficiaries so as to increase the money available to other participants and beneficiaries in the future. It did not bring this action in search of any personal gain. Accordingly, the first *Hummell* factor weighs against an award of attorneys fees.

**B. The Ability of Plaintiff to Satisfy an Award of Fees**

Each party has provided evidence of Plaintiff's financial strength. Nevertheless, the analysis respecting this factor is not as simple as the parties would have us believe. A viable ERISA plan will always have money. Still, we must consider whether an award of attorneys fees would have a substantial impact on the plan so as to affect the benefits available to other participants and beneficiaries. We must be careful, however, not to give this concern undue weight because an award of attorneys fees against a plan will always indirectly deprive funds from other participants and beneficiaries.

Here, there is no evidence indicating that an award of attorneys fees would have a substantial impact on the plan. Although there is evidence that the financial strength of the plan has been waning since December 31, 2000, there is nothing to suggest that the plan's participants and beneficiaries would be unduly harmed by an award. Under the totality of the circumstances, the second *Hummell* factor slightly favors an award of attorneys fees.

### C. Whether an Award of Fees against Plaintiff Would Deter Others from Acting Under Similar Circumstances

In some respects, the third *Hummell* factor, deterrence, is dependent upon the first. *See United Brotherhood of Carpenters & Jointers v. Endicott Enterprises, Inc.*, 806 F.2d 918, 923 (9th Cir. 1984); *Raff v. Belstock*, 933 F. Supp. 909, 917 (N.D. Cal. 1996). As discussed above, we do not believe that Plaintiff brought its claims in bad faith. Plaintiff did not bring its claims for personal gain. It sought to recoup money expended on behalf of one family of participants and beneficiaries so as to increase the money available to other participants and beneficiaries. Although we rejected Plaintiff's "defendant in possession" theory, we do not consider Plaintiff's conduct to be of the type that requires deterrence. Given the Supreme Court's decision *Knudson*, Plaintiff's theory was not a settled matter in this circuit. We note, however, that once the issue is settled, the bringing of such a claim may be conduct requiring deterrence. However, under the circumstances applicable to this case, the fourth *Hummell* factor weighs against an award of attorneys fees.

### D. Whether Defendants Sought to Benefit All Participants and Beneficiaries of an ERISA Plan or to Resolve a Significant Legal Question Regarding ERISA

The fourth *Hummell* factor also weighs against an award of attorneys fees. Defendants did not seek to benefit other ERISA participants and beneficiaries of the plan. By retaining the money expended by Plaintiff on their behalf while receiving funds from the underlying state court settlement, Plaintiffs have actually reaped a windfall at the expense of all. Further, as discussed above, ERISA does not create a right for ERISA participants and beneficiaries to be free from reimbursement. It merely lacks a means by which ERISA plans can enforce their reimbursement provisions. Ultimately, the legal question decided in this case will benefit only a subset of participants and beneficiaries who have obtained funds from both a plan and third-parties. On balance, Defendants have not sought to advance the interests of other participants and beneficiaries. Moreover, as discussed above, Defendants did not seek to vindicate a right under ERISA as much as they sought to secure a windfall from Plaintiff's inability to obtain reimbursement. Accordingly, Defendants have not sought to resolve a significant legal question regarding ERISA.

### E. The Relative Merits of the Parties' Positions

Because Defendants ultimately prevailed in this litigation, the fifth *Hummell* factor favors an award of attorneys fees. *See Corder v. Baugh*, 53 F.3d 225, 232 (9th Cir. 1994). However, we cannot say that the merits of parties'

positions were so disparate that this factor weighs strongly in favor of a fee award.

### F. Conclusion

After weighing all of the *Hummell* factors, we conclude that the purposes of ERISA would not be served by an award of attorneys fees in this case. Moreover, our balance of the *Hummell* factors also shows that special circumstances exist in this case for denial of fees.

## III. DISPOSITION

For the foregoing reasons, Defendants' motion for attorneys fees is **DENIED**. Weldon's motion for attorneys fees is also **DENIED**.[1]

**IT IS SO ORDERED.**

**MINUTES FORM 11**

CIVIL-GEN **Initials of Deputy Clerk [illegible]**

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1. Because we conclude that an award of fees is not justified in this case, we need not address Plaintiff's other argument as to why Weldon and McClellan are not entitled to fees.

## APPENDIX C — CIVIL MINUTES-GENERAL OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED NOVEMBER 14, 2002

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**CIVIL MINUTES-GENERAL**

**Case No.:** CV 02-04920-GHK(PJWx)

**Date:** November 14, 2002

**Title:** **Carpenters Health & Welfare Trust for Southern California v. Timothy Yonderharr, et al.**

**DOCKET ENTRY**

**PRESENT: Hon. *George H. King*, United States District Judge**

| | |
|---|---|
| *Beatrice Herrera* | *None* |
| Deputy Clerk | Court Reporter |

**ATTORNEYS PRESENT FOR PLAINTIFFS:**

None

**ATTORNEYS PRESENT FOR DEFENDANTS:**

None

*Appendix C*

**PROCEEDINGS: Defendants' Motion to Dismiss Plaintiff's First Amended Complaint and Request for Declaratory Relief**

This matter is before the court on the above-titled motion. This motion is appropriate for resolution without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. After fully considering the briefs and papers pertaining to this matter, we rule as follows:

This matter is before the court on the above-titled motion. This motion is appropriate for resolution without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. After fully considering the briefs and papers pertaining to this matter, we rule as follows:

## I. BACKGROUND

On June 21, 2002, Plaintiff Carpenters Health and Welfare Trust for Southern California ("Plaintiff's filed its original Complaint seeking reimbursement and declaratory relief under the Employee Retirement Income Security Act ("ERISA") and asserting five state law claims. The Complaint named eight defendants: four members of the Vonderharr family (collectively, the "Vonderharrs"); the Vonderharrs' former attorney, Charles Weldon; their present counsel, McClellan & Associates ("McClellan'); Ford Motor Company ("Ford'); and Ford's counsel, Yukevich & Sonnett ("Yukevich").

On July 18, 2002, defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion was transferred to Judge Hupp for his consideration. On August 19, 2002, Judge Hupp granted

defendants' motion, dismissing all claims against Defendants Ford and Yukevich without leave to amend, dismissing the state law claims against the Vonderharrs, Weldon, and McClellan without leave to amend, and dismissing Plaintiff's ERISA claims against the Vonderharrs, Weldon, and McClellan with leave to amend.

On August 30, 2002, Plaintiff filed a First Amended Complaint ("FAC") asserting claims for a constructive trust/ equitable lien and declaratory relief pursuant to ERISA. The FAC alleges that following an automobile accident, Plaintiff paid benefits of the Vonderharrs under a medical benefits insurance program. FAC ¶¶ 1, 3, 4, 9, 10. Pursuant to the plan, the Vonderharrs and Weldon agreed to reimburse Plaintiff for any amounts recovered from third parties. *Id.* at 11. The Vonderharrs apparently have received a settlement of at least $30,000 from third-parties ("settlement funds"), which Plaintiff seeks to recover pursuant to the plan's reimbursement provision. *Id.* at 12. Defendants allegedly have refused to disclose the exact amount of the settlement funds or who possesses them. *Id.* at 14, 17. On September 9, 2002, the Vonderharrs and McClellan filed this motion to dismiss the FAC pursuant to Rule 12(b)(6) and sought declaratory relief against Plaintiff. On September 11, 2002, Weldon joined in the motion.

*Appendix C*

## II. RULE 12(b)(6) MOTION TO DISMISS

A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cal. Dump Truck Owners Assoc. Inc. v Assoc. Gen. Contractors of Am.*, 562 F.2d 607, 614 (9th Cir. 1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957)). In resolving a Rule 12(b)(6) motion, we must: (1) accept all well-pleaded factual allegations as true; (2) construe the complaint in the light most favorable to the plaintiff; and (3) determine whether plaintiff could prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

### A. *Plaintiff's Constructive Trust/Equitable Lien Claim*

Plaintiff asserts a claim for constructive trust/equitable lien pursuant to ERISA § 502, which provides:

> (a) Persons empowered to bring a civil action. A civil action may be brought ... (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C. § 1132(a)(3). In *Great West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204 (2002), on

facts similar to those in the instant action, the Supreme Court noted that "the term 'equitable relief' in § 502(a)(3) must refer to 'those categories of relief that were typically available in equity. . . .'" *Id.* at 210 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993)). A claim for restitution can be characterized as equitable but "not all relief falling under the rubric of restitution is available in equity.' *Id.* at 212. *Knudson* recognized that, "[i]n the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity." *Id.* Where the plaintiff could not assert title or right to possession of particular property but might have been able to show just grounds for recovering money to pay for some benefit he had conferred on the defendant, the plaintiff had a right to restitution at law. *Id.* at 213. The foregoing describes the situation in the instant action. Plaintiff claims that it is entitled to recover money from defendants because it conferred a benefit upon the Vonderharrs. Thus, Plaintiff's claim for reimbursement more closely resembles legal restitution, which is a form of relief unavailable under ERISA § 503(a)(3). *See Knudson*, 534 U.S. at 218.

Plaintiff attempts to characterize its claim as an equitable claim for a constructive trust or an equitable lien. *Knudson* recognizes the constructive trust and equitable lien as subspecies of equitable restitution. However, either form of relief can only be sought "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* We find this language to support the Ninth Circuit's requirement that a constructive trust be "born from some form of ill-gotten gain of another's property."

*FMC Medical Plan v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1997). We find further support for this proposition in *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000), wherein the Court noted that:

> [whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same .. . .

*Id.* at 250-51; *see also Knudson*, 534 U.S. at 215-16. To establish a constructive trust, which is a form of equitable restitution, the plaintiff must establish that the money or property sought was obtained by the defendant through some wrongful means, such as fraud, duress, breach of fiduciary duty, or unconscionable behavior. *See Owens*, 122 F.3d at 1261.

In this case, there is no allegation, nor can there be, that the money Plaintiff seeks was unconscionably obtained from Plaintiff. The Vonderharrs obtained the settlement funds from Ford, not Plaintiff. Accordingly, Plaintiff does not seek equitable restitution from defendants. Rather, its seeks to impose personal liability on defendants through a contractual obligation to pay money, and "money damages are, of course, the classic form of legal relief." *Mertens*, 508 U.S. at 255; *Knudson*, 534 U.S. at 210.

Whether the money was in the possession of the Vonderharrs, McClellan, or Weldon is irrelevant because Plaintiff has failed to allege the predicate for a constructive trust. *See Westaff (USA), Inc. v. Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002) (concluding that, even where the money at issue had been placed in an escrow account and remained specifically identifiable, the action remained one for money damages, and the district court correctly dismissed the case for failure to state a claim).

Plaintiff's attempts to characterize its claim as one for equitable restitution are unpersuasive. In analyzing a claim for reimbursement, both the Supreme Court and the Ninth Circuit have cautioned us to look "past the parties' chosen labels to the substance of the relief sought." Here, Plaintiff seeks a legal remedy that is unavailable under ERISA § 502(a)(3). Accordingly, its claim under § 502(a)(3) is dismissed, without further leave to amend.

**B. *Plaintiff's Claim for Declaratory Judgment***

Plaintiff also seeks a declaration that it may cease paying future medical benefits to the Vonderharrs for accident-related injuries. The Declaratory Judgment Act allows the court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," so long as there is "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). With respect to the "actual controversy" requirement, the facts alleged must show that there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the

issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

The bases for the Plaintiff's request for declaratory judgment are two provisions of the plan. Under the first provision, Plaintiff may deny benefits otherwise available if the plan "is entitled to reimbursement for that benefit, and if those who are obligated to perform acts to accomplish that reimbursement fail to do so, but only as to the benefits to Ex. 3 at 53 ("Exclusion 18"). Plaintiff's claim cannot be sustained on this basis, because it is nothing more than an attempt to assert Plaintiff's right to reimbursement, which the foregoing discussion has shown that Plaintiff does not have. Instead of seeking reimbursement from the Vonderharrs directly, Plaintiff seeks a declaration that would provide a method of indirect reimbursement. We cannot give Plaintiff a right to reimbursement through declaratory relief to which it is not entitled under ERISA.

The second provision of the plan allows Plaintiff to deny "any benefit that would otherwise be available, if the Trust determines that payment has already been made for same from a third party, for example a personal injury lawsuit settlement that the Trust determines includes payments for future medical care." Gomez Decl. Ex. 3 at 53 ("Exclusion 19"). We dismiss Plaintiff's claim for declaratory relief upon this basis without prejudice because there has been no allegation that the Vondherharrs have requested, and been denied, any benefits. Thus, the facts alleged do not demonstrate a substantial controversy of sufficient immediacy for declaratory relief. Moreover, the declaratory relief Plaintiff seeks would be contrary to the specific notice

and review procedures provided by ERISA § 503, 29 U.S.C. § 1133, which requires every employee benefit plan to "provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant" and to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." The Secretary of Labor, under the authority of § 503, has set forth "minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries." 29 C.F.R. § 2560.503-1(a). A declaration that Plaintiff may cease paying future medical benefits to the Vonderharrs for accident-related injuries would allow Plaintiff to bypass these claims procedures. Because we are reluctant to tamper with Congress's "carefully crafted and detailed enforcement scheme," *Mertens*, 508 U.S. at 254, we decline to declare that Plaintiff need not pay benefits that have yet to be requested.

## III. DEFENDANTS' REQUEST FOR DECLARATORY RELIEF

In their motion to dismiss, defendants request a declaration that Plaintiff must continue to pay the Vonderharrs future accident-related benefits otherwise due. Defendants' request suffers from the same "actual controversy' problem discussed above. Moreover, they have filed no counterclaim for declaratory relief. Under these circumstance, a motion to

dismiss is not the proper vehicle for defendants to seek declaratory relief. Accordingly, defendants' request is denied, without prejudice.

## IV. DISPOSITION

For the foregoing reasons, defendants' motion to dismiss Plaintiff's FAC is **GRANTED**. Plaintiff's claim for a constructive trust/equitable lien under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), is **DISMISSED** with prejudice. Plaintiff's claims for declaratory relief are **DISMISSED** with prejudice as to Exclusion 18 and **DISMISSED** without prejudice as to Exclusion 19. Defendants' request for declaratory relief is **DENIED**, without prejudice.

**IT IS SO ORDERED.**

**MINUTES FORM 11**

**CIVIL-GEN** **Initials of Deputy Clark [illegible]**

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 3, 2004

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

No. 02-57183
D.C. No. CV-02-04920-GHK

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff - Appellant,

v.

TIMOTHY VONDERHARR; et al.,

Defendants - Appellees.

---

No. 03-55296
D.C. No. CV-02-04920-GHK

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff - Appellee,

v.

TIMOTHY VONDERHARR; et al.,

Defendants - Appellants.

*Appendix D*

No. 03-55312
D.C. No. CV-02-04920-GHK

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

Plaintiff - Appellee,

v.

TIMOTHY VONDERHARR,

Defendant,

and,

CHARLES R. WELDON LAW OFFICES,

Defendant - Appellant.

**ORDER**

Before: CANBY, NOONAN, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Thomas vested to deny the petition for rehearing en banc and Judges Canby and Noonan so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 04-1049

IN THE

# Supreme Court of the United States

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

*Petitioner,*

*v.*

TIMOTHY VONDERHARR; KAREN VONDERHARR, MINOR BY HER GUARDIAN AD LITEM, TIMOTHY VONDERHARR; LAUREN VONDERHARR, MINOR BY HER GUARDIAN AD LITEM TIMOTHY VONDERHARR; SARA VONDERHARR, MINOR BY HER GUARDIAN AD LITEM, TIMOTHY VONDERHARR; CHARLES R. WELDON LAW OFFICES; DOES, ITO X, INCLUSIVE; MCCLELLAN & ASSOCIATES, A PROFESSIONAL CORPORATION,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION


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## CORPORATE DISCLOSURE STATEMENT

Respondent Ford Motor Company has no parent corporation and there is no publicly held corporation holding 10% or more of Ford Motor Company stock.

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## STATUTES INVOLVED

In addition to the statutes cited by petitioner, the following statute is also involved:

### 29 U.S.C. § 1144 Other laws

> (a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and tile IV shall supersede any and all State laws insofar as they may now or hereafter related to any employee benefit plan described in section 4(a) (29 U.S.C. § 1003(a)) and not exempt under section 4(b) (29 U.S.C. § 1003(b)). This section shall take effect on January 1, 1975.

## STATEMENT OF THE CASE

The origin of the instant case dates back to December 26, 1998 when four members of the Vonderharr family were injured in a serious automobile collision in Norwalk, California. Lauren Vonderharr, age 11, suffered a severe brain injury with permanent impairment, and also incurred the bulk of the family's medical bills. Timothy Vonderharr was a member of the Carpenter's Union at the time of the incident and had health insurance through the union for the entire family. The union plan paid $155,000 of the family's medical bills under the plan.

The Vonderharrs retained McClellan & Associates to pursue a products liability action for personal injuries against Ford Motor Co., which was ultimately settled. The union plan retained counsel to attempt to assert a contractual right

of reimbursement contained in the plan. The McClellan firm repeatedly advised appellant's counsel in the underlying case of the fact that reimbursement or subrogation provisions were not proper under ERISA, to no avail. Petitioner CHWT, through its same attorneys, then filed the underlying action against the entire Vonderharr family, their present and past attorneys, Ford Motor Company, and Ford Motor Company's attorneys (a total of eight defendants). The action alleged seven causes of action and sought compensatory and punitive damages, as well as attorneys' fees, from each defendant [ER 1] but never survived the pleadings stage.

There has never been any question of any wrongful conduct of any kind on the part of any defendant in this case, which was recognized by all of the district judges and the Ninth Circuit opinion. Therefore, there is no basis for a constructive trust or equitable lien. Notably, and in contrast, petitioner itself admits (at page 3) that CHWT "required" the Vonderharrs to execute a document purporting to convey a lien "prior to paying claims resulting from their injuries." It has become a common and abusive practice of ERISA plans to refuse payment of an insured's medical expenses until some extracontractual reimbursement agreement is signed. Obviously, this practice gives no credence to the necessity of consideration necessary to support changes to a written contract nor to the effect of duress on contractual obligations.

Within seven days of filing suit, petitioner was advised by court order that it had little likelihood of prevailing in the action. On June 28, 2002, Judge Lourdes Baird denied plaintiff's motion for TRO, finding that, "Carpenters has failed to show that it is likely to succeed on the merits of its action because Ninth Circuit and Supreme Court precedent appears to foreclose its attempts to be reimbursed for the

$155,224.43 that it has paid out to the Vonderharrs." [ER 392.] However, petitioner declined to drop the action and two FRCP 12(b)(6) motions were necessary to have the case dismissed. Petitioner then appealed to the Ninth Circuit and respondents cross-appealed the district court's denial of fees. The Ninth Circuit affirmed the dismissal of all federal claims under ERISA, reversed the district judge's denial of respondents' fees and vacated and remanded the issue of any state claims under the prior decision in *Providence Health Plan v. McDowell*, 361 F.3d 1243 (9th Cir. 2004). Since that time, the Ninth Circuit has awarded respondents their attorneys fees and costs on appeal.

There is a significant misstatement or admission in petitioner's Statement of the Case. Therein, petitioner claims that they have applied the "make whole" doctrine to this case. In fact, as discussed below, if the make whole doctrine were applied, it would result in petitioner's claim being reduced to zero.

## REASONS FOR DENYING THE PETITION

### I. IF THE PETITION IS DENIED, ALL OF CHWT'S CLAIMS WILL BE REJECTED AND THE PROPER RESULT REACHED UNDER THE LAW

This Court has held that contractual reimbursement provisions are not enforceable under ERISA in *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). This case also clarified that the Ninth Circuit was the only circuit that had been properly applying the law of ERISA in regard to such provisions at that time. More recently, this Court has directly held that the ERISA enforcement scheme is exclusive and that no state law cause of action that

supplements or supplants it can survive ERISA preemption. In *Aetna Health v. Davila,* 124 S. Ct. 2488 (2004), the Court held:

> "The six **carefully integrated civil enforcement provisions** found in § 502(a) of the statute as finally enacted . . . **provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot** to incorporate expressly." *Id.*, 481 U.S., at 54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (quoting *Russell, supra,* at 146). quoting from *Pilot Life v. Dedeaux*, 481 U.S. 41, 54.
>
> Therefore, **any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.** *See* 481 U.S., at 54-56, 95 L. Ed. 2d 39, 107 S. Ct. 1549; *see also Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 143-145, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990) (emphasis supplied) 124 S. Ct. at 2495.

In light of these two cases, it is perfectly clear that contractual reimbursement provisions cannot be asserted under ERISA and that such provisions cannot be pursued outside ERISA under any state law cause of action. Since breach of contract actions are not available to ERISA fiduciaries, they simply do not exist. For that reason, it appears that *Providence Health Plan v. McDowell,* 361 F.3d 1243 (9th Cir. 2004), *pet. for en banc review denied,* 385 F.3d 1168, was wrongly decided when it held that a reimbursement provision in an

ERISA plan itself could be pursued in state court on a breach of contract theory. It is expressly inconsistent with this Court's holding in *Davila, supra.*[1]

Even if the *McDowell* case is not modified on the petition for writ of certiorari, the result in the instant case should eventually be entirely correct. On remand to the district court, the state claims should be dismissed on the merits pursuant to *Davila, supra.* In the alternative, the district court could dismiss for lack of federal jurisdiction. If CHWT then pressed its action for state claims in state court, said action would be properly dismissed under *Davila, supra*, and *Jefferson Pilot Life Insurance Co. v. Krafka*, 50 Cal.App.4th 190 (1996). *Krafka* correctly applied and followed this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, much as this Court did in *Davila, supra.*

Since the decision of the Ninth Circuit is correct except for the fact that the panel's hands were tied by the incorrect *McDowell* decision, and the end result is dictated by *Davila*, there is no compelling reason to grant certiorari in order to correct an erroneous decision. Clarifying the law on constructive trusts could be accomplished more effectively by hearing one of the cases from another circuit misapplying such law.

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[1] The *McDowell* case also has a petition for writ of certiorari pending.

## II. REIMBURSEMENT PROVISIONS HIDDEN IN HEALTH INSURANCE PLANS VIOLATE THE WHOLE CONCEPT OF INSURANCE

Reimbursement provisions purport to convert health insurance policies into something akin to a loan obligation. However, the loan obligation is rarely communicated to the insured in any effective form until after the loss occurs. This precludes an insured giving his informed consent to the obligation incurred. Typically, the reimbursement obligation is hidden well back in the contractual documents provided to the insured. In this case, the provision appears at page 26 of the plan but is frequently hidden even deeper in the policy documents. This is particularly troublesome in ERISA cases where the insured is confronted with a bureaucratic tangle of required documents, including the Summary Plan Description, Evidence of Coverage, Summary of Benefits and the ERISA Plan itself.

The Supreme Court of California has recently noted in *Haynes v. Farmers Insurance Exchange*, 32 Cal.4th 1198, 1210-1211 (2004):

> For nearly a hundred years we have recognized that "the rule [presuming parties are familiar with contract terms] should not be strictly applied to insurance policies. It is a matter almost of **common knowledge that a very small percentage of policy-holders are actually cognizant of the provisions of their policies**. . ." (*Raulet v. Northwestern etc. Ins. Co.* (1910) 157 Cal. 213, 230 [107 P. 292] [discussing a **lien** provision].)

This is the basis for the common state requirement that all exclusions or exceptions to insurance coverage be "conspicuous, plain and clear." *Haynes, supra*, at 1204. Insurance contracts are subject to special rules of construction because they are contracts of adhesion. *See also Ponder v. Blue Cross*, 145 Cal.App.3d 709 (1983) (exclusion in fine print on page 3 of 3 page policy found inconspicuous). Almost by definition, a reimbursement clause buried at page 26 of an ERISA plan is not conspicuous. As is typical, the Vonderharrs had never heard of it until after the loss. The provision was made known to them only by CHWT's post-accident demand that they sign reimbursement agreements before their brain damaged daughter's medical expenses would be paid.

More importantly, these hidden reimbursement provisions violate the fundamental concept of insurance, which is designed to spread risk. Such provisions accomplish the opposite result by placing all of the risk on the injury victim—frequently the person least able to afford it. Certainly, the injured victim is the person least able to spread the risk. Conversely, the entity most able to bear the risk, and typically in the business of insuring against or spreading risk, bears none of it.[2] Moreover, the risk being reallocated by virtue of the reimbursement provision is very significant to the catastrophic injury victim and very insignificant to the insurance company, union or benefit plan. By way of example, The Rawlings Company, LLC, is probably the largest collection agency in the country attempting to enforce ERISA reimbursement provisions. Rawlings' web site

[2] In the instant case, application of the *Hummell v. Rykoff* [634 F.2d 446, 453 (9th Cir. 1981)] factors showed that CHWT had a net worth of over $80,000,000 while the Vonderharrs were a working carpenter and his family.

(www.rawlingsgroup.com) advertises the following to potential customers: "Recoveries of over 1% of your company's total paid claims can be achieved annually from a single data source when using our full range of recovery services." The possibility of recapturing 1% of total claims[3] paid is an insufficient basis for eliminating the health insurance benefit of catastrophically injured victims who need the insurance benefit the most.

## III. IT IS A SIMPLE MATTER FOR ERISA PLANS AND FIDUCIARIES TO PROTECT THEMSELVES FROM RISK WITHOUT REIMBURSEMENT PROVISIONS

Insurance companies and large self-employed plans employ underwriters and actuaries. Group health plans, like CHWT, do the same. It is a function of underwriting to assess and spread risk. Contrary to the assertion by CHWT's counsel, a single loss can not bankrupt a plan, absent underwriting negligence. That is the reason that virtually all insurance plans employ reinsurers.

One of the functions of underwriting is to assess legal decisions affecting risk. Thus, when the Ninth Circuit first held that ERISA did not allow for contractual reimbursement in *PacifiCare v. Martin*, 34 F.3d 834 in 1994, that fact should have been noted by CHWT's underwriters. This prohibition on reimbursement under ERISA has been the subject of at least seven Ninth Circuit cases since then. The Ninth Circuit's

[3] Moreover, since "total paid claims" are far less than premiums collected, due to overhead, administration, profit, etc., it is likely that total reimbursement as a percent of total premiums would be less than one-half of one percent.

position barring reimbursement was affirmed by this Court in *Knudson, supra*, in 2002.

At some point early in this process, this prohibition on reimbursement should have been acted upon by CHWT. Presumably, CHWT's underwriters did take note of this and passed it along to management for inclusion in the next collective bargaining agreement (CBA). It certainly would be legitimate for the union to note the prohibition and the nominal added cost of same and propose an offsetting premium increase of less than one percent. Typically, these CBA's come up for renewal every several years. Having increased the premiums charged the employers through the CBA, CHWT has already been compensated for the inability to seek reimbursement under ERISA, and is seeking a double recovery. If CHWT has not nominally increased its charges though the CBA, it should not be rewarded for its negligent underwriting.

## IV. THERE IS NO UNJUST ENRICHMENT TO THE PLAN PARTICIPANT BY DENYING REIMBURSEMENT—ONLY TO THE ERISA PLAN IF ALLOWED

It is worth noting that this Court's holding in *Knudson, supra*, was not a change in the law. Rather, it was an interpretation of what the law has been since its passage in 1974. Petitioner CHWT is attempting to sue for contractual reimbursement, which is expressly disallowed under ERISA. In *Westaff v. Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003), the Ninth Circuit plainly held that reimbursement actions were lawsuits that "Congress, in enacting ERISA, intended to bar." Nevertheless, personal

injury victims like the Vonderharrs are still being sued by their own plans for reimbursement. ERISA plans are still including contractual reimbursement provisions in their documents and filing suits against participants and beneficiaries who stand on their rights, as announced by this Court. Therefore, it is clear that ERISA plans have been unjustly enriching themselves at the public expense for over three decades.

In the context of seeking reimbursement from ERISA insureds, reimbursement and subrogation provisions are generally considered interchangeable terms. *See Reynolds Metals v. Ellis*, 202 F.3d 1246, 1247 (9th Cir. 2000). In *Subrogation: A Pandora's Box Awaiting Closure*, 41 S. Dakota L. Rev. 237, 242 (1996), Professor Roger Baron discusses the insurance industry's claim of unjust enrichment to the insured as the rationale for reimbursement/subrogation:

> For the most part, this rationale is flawed. The "double recovery" argument has been proved to be duplicitous. In most cases, there would not be any "double recovery" for the insured if subrogation is denied. Rather, the great irony is that in the vast majority of cases, the insurer who asserts that the insured will receive an unwarranted "double recovery" is itself picking up a windfall recovery if subrogation is permitted.

On the other hand, personal injury victims, like the Vonderharrs, are not being unjustly enriched. As noted above, insureds are rarely aware of reimbursement provisions until they have been subjected to one. In stating the rationale

behind the collateral source rule, the California Supreme Court has recognized that a personal injury victim "rarely receives full compensation for his injuries .. ." *Helfend v. Superior Court*, 2 Cal.3d 1, 12 (1970).

Additionally, CHWT's entire claim ignores the concept of the "make-whole" doctrine, despite the fact that in footnote 1, CHWT purports to apply it: "CHWT retains—when it did not have to—the common law 'make whole' rule . . ." This is a remarkable admission because the make whole doctrine would eliminate CHWT's claim entirely. Moreover, the statement overlooks the fact that the make whole doctrine is not only the majority rule but has also been adopted by the Ninth Circuit in ERISA cases in *Barnes v. Independent Auto. Dealers Assn. of Cal. H&B Plan*, 64 F.3d 1389 (1995). In *Barnes*, the court held:

> It is a general equitable principle of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole.
>
> . . .
>
> That rule is supported by substantial authority in existing insurance law, and it is consistent with ERISA's purpose of protecting participants in employee benefit plans. *Id.* at 1394-1395.

Professor Baron explains the make whole doctrine as follows:

> Perhaps the most attractive of the intermediate doctrines is the "make whole" doctrine. Under this doctrine, subrogation is permitted only after the insured has been fully compensated or "made whole." This approach acknowledges the realistic nature of tort recoveries and rejects the blind assertion that subrogation is necessary in order to prevent the insured from realizing a "double recovery." . . . It was recently reported that the "make whole" doctrine now serves as the majority view, having been adopted in twenty-five jurisdictions.
>
> . . .
>
> Under the "make whole" doctrine, recent decisions have come to focus on the real or "net" compensation actually received by the insured. If the insured has been required to hire an attorney and incur court costs in order to effectuate a recovery against the tortfeasor, those attorney's fees and costs should be considered in determining whether the insured has been fully compensated. *Baron, id* at 250-251.

Since the Vonderharr's attorneys fees and costs were in excess of CHWT's claim, the make whole doctrine, which petitioner's counsel has agreed applies to the case, would defeat petitioner's claim in its entirety.

Finally, it is notable that an ERISA fiduciary can only pursue claims for true equitable relief against plan participants, as underscored in *Knudson*. The "make whole" rule is an equitable doctrine and is designed to prevent an insured from falling into a secondary position on collection of his damages. With the various methods of protecting itself available to it, an ERISA fiduciary should never be allowed priority to an injured victim's damages.

## V. THIS COURT IN KNUDSON DID NOT CREATE A NEW LAW OF CONSTRUCTIVE TRUST APPLICABLE ONLY TO ERISA CASES

As this Court well knows, in *Knudson, supra*, the minority position of the Ninth Circuit barring assertion of contractual reimbursement provisions was affirmed. At the time of that decision, every other federal circuit that had ruled on the issue had allowed reimbursement. In *Knudson*, this Court conducted a precise analysis of the difference between equitable and legal restitution in order to determine the Congressional intent in drafting the ERISA civil enforcement scheme. The Court there held that assertion of contractual reimbursement schemes was not authorized under ERISA because such claims were necessarily legal in nature. At the conclusion of this discussion, and presumably by way of example, the *Knudson* Court noted:

> In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. (534 U.S. at 213).

This passage appears to be dicta in that it is not necessary to the Court's holding. It also clearly seems intended as a mere example to distinguish the legal form of restitution from the equitable form. There is absolutely nothing in the opinion to suggest that this language was intended to create a new form of constructive trust without the classic requirements of fraud, accident, mistake or other wrongful act.

CHWT contends that every circuit but the Ninth Circuit reaching the issue has allowed enforcement of ERISA reimbursement clauses through a constructive trust theory, but this is incorrect. CHWT claims (at page 9) that the Second, Third and Fourth Circuits have reached this conclusion but cites only cases not on point for that proposition, including two unpublished cases. One of these, *Local 109 Retirement Fund v. First Union National Bank*, 57 Fed.Appx. 139, 141 (4th Cir. 2003) actually directly supports respondent's position, as follows: "Moreover, Papageorge (the trustee) **does not point to any wrongdoing by the bank that would permit a court to impose a constructive trust**. Cf. *Restatement of Restitution*, § 160." (parenthetical and emphasis supplied). Therefore, in reality, it appears that only the Fifth and Seventh Circuits have allowed constructive trusts in ERISA reimbursement cases while the Sixth and Ninth Circuits (and the Fourth if one counts the unpublished *Local 109 Retirement Fund, supra*) have rejected them. Thus, the Ninth Circuit is not even in a minority position on this issue.

The Sixth Circuit has joined the Ninth Circuit in flatly rejecting such constructive trust cases in *QualChoice, Inc. v. Rowland*, 367 F.3d 638 (2004), and in *Community Health*

*Plan of Ohio v. Mosser*, 347 F.3d 619 (2003). In *QualChoice*, the court held:

> We conclude, however, that the source of the claim asserted by QualChoice is a contract to pay money, and that the procedural mechanisms for enforcing this right, as such relief would not have traditionally been awarded by a court of equity in a breach of contract. Historically, legal restitution was limited by the concept of formal title. Dobbs at 586. 367 F.3d at 648.

The *Qualchoice* court further held:

> Applying the Supreme Court's cases, we hold that a plan fiduciary's action to enforce a plan-reimbursement provision is a legal action, regardless of whether the plan participant or beneficiary recovered from another entity and possess that recovery in an identifiable fund. *Id.* at 650

Thus, the Sixth Circuit joins the Ninth Circuit (*Westaff v. Arce, supra*; *Honolulu Joint Apprenticeship Comm. of United Assn. Local Union No. 675 v. Foster*, 332 F.3d 1234 (2003), and the instant case, *Vonderharr*, 384 F.3d 667 (2004)) in rejecting any constructive trust argument being imposed as grounds to pursue contractual reimbursement under ERISA.

Nevertheless, at least two circuits that were allowing ERISA reimbursement before *Knudson* seized on the constructive trust language in *Knudson*, quoted above, to adopt a new rule that could be characterized as an "automatic constructive trust." CHWT has cited two of these cases in

its petition (at page 9, *Bombardier* and *Varco*). At its simplest level, this rule appears to be that in ERISA cases only, where an ERISA fiduciary with a contractual reimbursement provision locates a personal injury recovery and sues the person holding that recovery, constructive trust attaches as a matter of law. Somehow, a simple breach of contract claim metamorphoses into a constructive trust claim with none of the requisite elements of such a trust. This notion turns the entire law of constructive trust on its head. It is respectfully submitted that this cannot have been the intent of the Court in including the above passage in *Knudson*.

There is substantial authority for respondents' position in the law of constructive trust itself. There appears to be virtually no authority for the post-*Knudson* line of cases allowing the "automatic constructive trust." By way of example, California's law of constructive trust appears typical and is codified at Civil Code § 2224:

> One who gains a thing by **fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act** is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained . . . (emphasis supplied)

As the Ninth Circuit's decision in *Murphy v. Rowe Price Prime Reserve Fund, Inc.*, 8 F.3d 1420, 1422 (1993), notes, "[a] constructive trust is rarely imposed unless there is an allegation of wrongful behavior."

The requirement for some wrongful conduct to impose a constructive trust in an ERISA reimbursement case was first set forth in *FMC Medical Plan v. Owens*, 122 F.3d 1258

(9th Cir. 1997). There, the court relied on this Court's prior decision in requiring some wrongful act, as follows:

> Restitution is referred to in **Mertens as the return of ill-gotten assets or profits taken from a plan** Mertens, 508 U.S. at 260, 113 S. Ct. at 2071. Owens did not obtain FMC's funds by any fraud or wrong-doing. Owens obtained the funds pursuant to the Plans, which obligated the funds to be paid to him under the circumstances of this case. FMC's claim is for reimbursement of money that Owens rightfully received under the plans. Essentially, **FMC seeks a breach of contract for monetary relief**, albeit under its classification of "equitable reimbursement." Such monetary relief is **not available** under section 1132(a)(3)." *Id.* at 1261. (emphasis supplied).

More importantly, this Court has always referenced that there are requirements of constructive trust and never suggested that an automatic constructive trust would apply in ERISA reimbursement cases. Following *Mertens, supra*, this Court addressed the issue at length in *Harris Trust v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000), (also an ERISA case), with repeated references to wrongful conduct:

> Importantly, that a transferee was not "the original **wrongdoer**" does not insulate him from liability for restitution. *See also, e.g.*, Restatement of Restitution ch. 7, Introductory Note, p. 522 (1937); 1 Dobbs, *supra*, § 4.3(2), p. 597 ("The constructive trust is based on property, not wrongs"). It also bears emphasis that the

> common law of trusts **sets limits on restitution actions against defendants other than the principal "wrongdoer."** Only a **transferee of ill-gotten trust assets** may be held liable, and then only when the transferee (assuming he has purchased for value) knew or should have known of the existence of the trust and the circumstances that rendered the transfer in **breach of the trust**. Translated to the instant context, the transferee must be demonstrated to have had actual or constructive knowledge of the circumstances that rendered the **transaction unlawful**. Those circumstances, in turn, involve a showing that the *plan fiduciary*, with actual or constructive knowledge of the facts satisfying the elements of a § 406(a) transaction, caused the plan to engage in the transaction. *Lockheed Corp. v. Spink,* 517 U.S. 882, 888-889, 135 L. Ed. 2d 153, 116 S. Ct. 1783 (1996) n.3. (emphasis supplied)

The *Harris* decision is replete with references to wrongdoing, or knowledge of same. This is because the common law of trusts has always required such conduct, or mistake, or knowledge of such to impose a constructive trust. This is consistent with the leading treatises in the area of trusts, as cited by this Court. This Court has cited Bogert and the Restatement of Restitution in *Harris Trust*, *supra*. In Bogert, *The Law of Trusts and Trustees*, § 471, constructive trusts are defined, using the following language:

> When a court of equity finds that a defendant is the holder of a property interest which he retains by reason of **unjust, unconscionable, or**

> **unlawful means**, it takes such interest from the defendant and vests it in the wronged party.
>
> . . .
>
> There are many synonyms for the constructive trust. It has frequently been called a trust "ex maleficio" or "ex delicto" because it **is based on the wrongful conduct of the trustee.**
>
> . . .
>
> In order to obtain a constructive trust the plaintiff **must identify specific property** as the res of the trust to which he is entitled. **Mere breach of contract does not entitle the complainant to a constructive trust**, nor does proof that defendant had been guilty of some wrongdoing and has assets that could be used to satisfy the complainant's claim. (emphasis supplied; footnotes omitted)

In Bogert, *Trusts*, 6th Ed., § 77, the author notes that constructive trusts, "are often based on disloyalty or other breach of trust by an express trustee, and are also created when . . . property is obtained or retained by other unconscionable conduct." Bogert, *id.*, § 77 also notes that such trusts "in a general way may be called 'fraud-rectifying' trusts, if the word 'fraud' is used in the sense of any kind of wrongdoing and not confined to an intentional false representation."

In the Introduction to *Restatement Trusts*, 3d, constructive trusts are defined generally as arising against a

person whose "acquisition or retention of the property is wrongful. . . ." In the Restatement, Restitution, Introductory Note, *Proceedings in Equity*, it is noted that, "the extraordinary jurisdiction of the Court of Chancery . . . was exercised in cases in which a fiduciary had failed to perform his duties . . . and in cases in which a person by fraud, mistake or duress had been deprived of property. . . . Part II of the Restatement, Restitution deals with constructive trust and analogous equitable remedies. §§ 163-171 thereof catalogues the most common categories of conduct justifying constructive trust. Each of these categories bears the words "mistake" or "wrong," or both, in the title.

This Court has also cited Dobbs, *Law of Remedies* in several of these cases. Dobbs does suggest that the requirement of wrongdoing is antiquated and no longer necessary. However, when examples of the modern law of constructive trusts are provided therein, they are replete with references to either wrongful conduct or mistake:

> Application of constructive trusts today. Restitution by way of constructive trust and similar remedies may be appropriate for **embezzlement** of money or for conversion of goods, for benefits transferred because of **fraud**, or **duress**, or **undue influence**, and for gains received by reason of **misuses** of position or information. Analogous relief has been given for such torts as **infringement** of copyright and the like. Even the **murderer for gain** may be a constructive trustee. But wrongdoing is not required. Property transferred by **mistake**, for example, may be recovered. . . . Dobbs, § 4.3(2) (emphasis supplied)

The likely explanation for this apparent contradiction is that in order for a plaintiff to have the necessary higher moral claim to the property, some form of wrongful conduct or mistake is normally required. Certainly, a mere allegation of breach of contract, especially when the contract is unlawful under ERISA, is insufficient as a matter of law.

Moreover, for either constructive trust or an equitable lien to attach, the same property has to be involved. Notably, Dobbs indicates that plaintiff cannot get a constructive trust or equitable lien on property without specifically tracing that same property to the defendant's possession:

> . . . this naturally implies that the plaintiff must identify specific property which can be regarded by equity as belonging to him. If the only evidence is that the defendant obtained the plaintiff's money, the plaintiff has established a debt claim that can be pursued by an ordinary judgment at law but has not established a basis for a constructive e trust or equitable lien on particular property. Dobbs, § 6.1(3).

Likewise, Bogert, *id.*, § 865, confirms that an equitable lien is not available unless the beneficiary can trace a trust fund to property in the hands of the defendant.

> This right to a lien does not exist except as the beneficiary can trace the trust fund in whole or in part into the hands of the defendant. The beneficiary has no right to a lien on property of the defendant which is unrelated to the trust property, and is not a product of it, except as the beneficiary obtains such a lien by docketing his judgment or by execution or attachment.

In the instant case, there are two separate pools of property. The first is the CHWT's payment to the medical providers of the Vonderharr's medical bills. As is typical, all such payments were made to the providers—not to the Vonderharrs. Therefore, the Vonderharrs never possessed any funds of CHWT that were paid for medical expenses. The second pool was the Vonderharr's settlement funds paid by the tortfeasor. These funds were never in CHWT's possession. Consequently, there is no way for CHWT to claim entitlement to a constructive trust to property that never belonged to it and was never in its possession. All that CHWT has is a mere contract claim against the Vonderharrs that is clearly prohibited by the exclusive ERISA civil enforcement scheme as interpreted in *Knudson* and *Davila, supra.* Such a claim, that is prohibited by federal law, is a legal nullity. It certainly does not give rise to a constructive trust nor to an equitable lien.

A simple example may help illustrate this. If CHWT had overpaid a medical provider by mistakenly sending $20,000 on a $2,000 claim, a constructive trust would lie against the provider because of the mistaken payment and the provider's knowledge of same. If the provider had tried to insulate the $18,000 overpayment by giving it to his bookkeeper, with an explanation of the facts, the constructive trust would apply to the bookkeeper's possession as well, because the bookkeeper was aware of the mistake. However, under no circumstances would a proper action for constructive trust lie against the provider's patient who did not receive the money paid by CHWT.

If the "automatic constructive trust" argument advanced by CHWT were to be accepted, it would create a constructive trust any time that a breach of contract occurred, leading to a

retention or loss of contract benefits. If that were to become the law, it would eliminate the *Pilot Life* doctrine, and bring back the law of first party bad faith to ERISA. Most states have statutory or common law by which a covenant of good faith and fair dealing is implied in every contract of insurance. Violation of that covenant is a breach of the contract of insurance, entitling the insured to sue for damages. This action for insurance bad faith was the precise cause of action eliminated in *Pilot Life, supra.* However, under the "automatic constructive trust" rule, these breaches of insurance contract would become constructive trust cases, allowing the insureds to recover all of their state damages claims barred by the *Pilot Life* line of cases. This is clearly not the law nor the intent of this Court. However, it ably demonstrates the double standard inherent in the relief which CHWT is seeking. It is the same double standard criticized by the seven judge dissent in *McDowell*, 385 F.3d 1168.

## VI. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI TO DETERMINE WHETHER ERISA REIMBURSEMENT CLAIMS SHOULD BE DISMISSED ON THE MERITS OR FOR LACK OF SUBJECT MATTER JURISDICTION

It is clear from the ERISA statutes and this Court's opinions that contractual reimbursement actions are not authorized under the ERISA civil enforcement scheme. Given that 29 U.S.C. § 1132(e) provides the district courts with exclusive jurisdiction of civil actions under ERISA, the sweeping preemption provision in 29 U.S.C. § 1144, operating as an exception to the well pleaded complaint rule (*see Davila, supra*), it would appear that the proper method would be to accept jurisdiction and to dismiss reimbursement

actions for failure to state a claim, as the court did in this case. However, since the Court did it properly in the instant case, it would seem that another case where a lack of federal jurisdiction was found would be more appropriate. However, unless a finding of lack of federal jurisdiction leads to a substantive problem, like a denial of attorneys fees, this appears to a distinction without a difference. Certainly, if a plan participant were denied fees simply due to a finding of lack of federal jurisdiction, such a case would be ripe for hearing.

## VII. THERE IS NO REASON WHATSOEVER TO DISTINGUISH ENTITLEMENT TO AN ATTORNEYS FEE AWARD BASED UPON WHETHER THE ERISA PARTICIPANT WAS A PLAINTIFF OR DEFENDANT

CHWT'S principal argument on the attorneys fee issue appears to focus on whether the prevailing ERISA participant was a plaintiff or defendant. This is completely specious. The parties were involved in a dispute concerning contractual ERISA documents. Given that either party was equally entitled to file an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, it should not matter who sued whom. In fact, if there were to be any differential in treatment of parties for fee purposes, one would assume that a prevailing ERISA defendant should be more entitled because they simply sought to be left alone. Any rule favoring plaintiffs in a fee award would simply tend to breed litigation.

CHWT's analysis completely overlooks the fact that there was an $80,000 fee award to a prevailing ERISA defendant in *Knudson*, in which case the Ninth Circuit's decision and position were affirmed. It also overlooks *Westaff*

*v. Arce, supra*, in which fees were awarded to a prevailing ERISA defendant in an ERISA reimbursement action and certiorari was denied at 537 U.S. 1111 (2003).

CHWT also reaches the amazing conclusion that it is likely to prevail on its state claims, which are alleged to be stronger because they carry punitive damages remedies. The state breach of contract claims are absolutely barred by this Court's most recent holding in *Davila, supra*, that, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." (*Id.* at 2495). However, it is interesting to observe the fanciful approach to litigation embodied by CHWT's position. Even though they are suing a brain damaged minor and her family for punitive damages under a discredited theory, and never survived the pleadings stage, they deem themselves to potentially be the "prevailing party."

## VIII. THE SPECIAL CIRCUMSTANCES PRESUMPTION OF FEES TO A PREVAILING ERISA PARTICIPANT SERVES A LEGITIMATE PUBLIC PURPOSE

It is interesting to observe that CHWT accepts the *Hummell v. Rykoff*, 634 F.2d 446 (9th Cir. 1980), factors but rejects the "special circumstances" doctrine, extended by the Ninth Circuit to ERISA cases only four years later. Indeed, it appears that CHWT concedes that the Ninth Circuit's *Hummell* test is the majority rule. CHWT also disregards that at least one other circuit has adopted the "special circumstances" rule, affording a presumption of fees to a prevailing ERISA participant. *See Harris Trust & Sav. Bank v. Provident Life & Acc. Ins. Co.*, 57 F.3d 608 (7th Cir. 1995).

CHWT's position further ignores the fact that the "special circumstances" doctrine was developed in reliance upon opinions by this Court. In *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984), the court held as follows:

> ERISA, like the Civil Rights Acts of 1871 and 1964, and the Labor-Management Reporting and Disclosure Act, is remedial legislation which should be liberally construed in favor of protecting participants in employee benefits plans. Section 502(g)(1), 29 U.S.C. § 1132(g)(1), authorizes the court to award attorney fees. This section "should be read broadly to mean that a plan participant or beneficiary, if he prevails in his suit under § 1132 to enforce his rights under his plan, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968)).
>
> As in cases involving section 1988 awards, *see Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40, a district court considering a motion for attorney's fees under ERISA should apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts. *See* 29 U.S.C. § 1001(b); S. Rep. No. 93-127, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871. As a general rule, ERISA employee plaintiffs should be entitled to a reasonable attorney's fee "if they succeed on any

> significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 76 L. Ed. 2d at 50 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). *See Lummi Indian Tribe*, 720 F.2d at 1125. *See also Central States Southeast v. Hitchings Trucking*, 492 F. Supp. 906, 909 (E.D. Mich. 1980). (*Id.* at 589).

The *Smith* court further quoted this Court on the importance of allowing fees to union members in litigation with their wealthy and powerful labor unions:

> As the Supreme Court said in *Hall v. Cole*, 412 U.S. 1, 13, 36 L. Ed. 2d 702, 93 S. Ct. 1943 (1973), a case involving attorney's fees under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*:
>
> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.

*Id.* at 590.

The reason that this Court created the special circumstances presumption in Civil Rights Act cases was to encourage enforcement of the Act through private litigation. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-402 (1968). The law of ERISA needs the same presumption in order that plan participants can stand up to improper actions brought by their plans. Without recourse to such a presumption, most plan participants facing threat of improper contractual reimbursement actions would be steamrolled into submission.

Similarly, the reason that the Ninth Circuit extended the "special circumstances" doctrine to ERISA cases was to give credence to the remedial nature of the legislation, designed to protect employees and their beneficiaries. That presumption in favor of fees is particularly applicable in a case where a wealthy union plan attempts to subvert the whole intent of insurance by placing the entire loss on a grievously injured plan participant. When the plan does so in direct contravention of this Court's controlling decision in *Knudson, supra*, an award of attorneys fees serves an important purpose. Everyone in an ERISA plan benefits when a particular case result protects other plan members against future claims that erode their individual insurance coverage. When that case is published and this Court denies certiorari, that same benefit extends to ERISA plan participants across the country.

## CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 04-1049

IN THE

# Supreme Court of the United States

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA,

*Petitioner*,

*v.*

TIMOTHY VONDERHARR; KAREN VONDERHARR, MINOR BY HER GUARDIAN AD LITEM, TIMOTHY VONDERHARR; LAUREN VONDERHARR, MINOR BY HER GUARDIAN AD LITEM TIMOTHY VONDERHARR; SARA VONDERHARR, MINOR BY HER GUARDIAN AD LITEM, TIMOTHY VONDERHARR; CHARLES R. WELDON LAW OFFICES; DOES, ITO X, INCLUSIVE; MCCLELLAN & ASSOCIATES, A PROFESSIONAL CORPORATION,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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## INTRODUCTION

In their Brief in Opposition, Respondents completely misapprehend the process of certiorari and the writ Petitioner Carpenters Health and Welfare Trust for Southern California's ("CHWT") filed in this case. Rather than addressing the key issue of why the facts and circumstances here should warrant review of this case, they seem content on submitting a brief on the merits that not only concedes that certiorari should be granted, but also shows why the Ninth Circuit's decision is wrong. In particular, they do nothing to rebut the point that the issue of the availability of money relief under Section 502(a)(3) is an issue of paramount importance to plans and one that should trigger review of this case. In addition, they also offer up no resistance to the circuit conflict that exists on this issue, and in their discussion on the split between the circuits, actually bolster the case for certiorari here. This is because they actually cite another case that supports the Ninth Circuit's view on Section 502(a)(3), which thus creates a more hardened circuit conflict. Also, in pointing out that some of the cases that do not arise of the reimbursement context, they only highlight the fact that this issue is one that extends to other substantive matters. This only emphasizes that this issue is one of great public importance, a point that CHWT raised in its Petition in arguing for review to be granted here.

For all these reasons and those set forth in the Petition and following discussion, CHWT respectfully requests that this Court grant certiorari in this case.

## DISCUSSION

### A. There Is A Pressing Circuit Conflict On The Issue Of The Availability Of Monetary Relief Under Section 502(a)(3) Of ERISA

In their discussion of how the different circuits have addressed post-*Knudson* Section 502(a)(3) issues, the Respondents somehow conclude that the federal appellate scorecard on this issue is a draw between four circuits. They do so by discounting the decisions of the Third and Fourth Circuits in *Sackman v. Teaneck Nursing Ctr.*, 86 Fed. Appx. 483, 2003 WL 23173649 (3d Cir. 2003) and *Local 109 Ret. Fund v. First Union Nat'l Bank*, 57 Fed. Appx. 139, 2003 WL 152851

(4th Cir. 2003), either because they are unpublished dispositions or because they are not reimbursement cases. To the extent that the Respondents are arguing that unpublished decisions cannot form the basis of a circuit conflict, they are clearly wrong. *Johnson v. United States*, 529 U.S. 694, 699 n.3 (citing to *United States v. Sandoval*. 69 F.3d 531 (1st Cir. 1995) (unpublished table decision) as one case creating a circuit conflict). Because both of these decisions do count in a circuit conflict analysis, the split among those cases is actually four to two.[1] In addition, because the Tenth Circuit has now ruled on this issue, *Administrative Committee of the Wal-mart Associates Health and Welfare Plan v. Melvin Willard*, 393 F.3d 1119 (10th Cir. 2004), the 'score' now is five to two. Respondents, however, argue that the Fourth Circuit's decision is actually a ruling weighing in favor of the Ninth Circuit view of this matter. Setting aside the fact that at least one circuit court, *Rowland*, 367 F.3d at 638 (6th Cir. 2004), has read *Local 109*'s holding differently than Respondents, if in fact *Local 109* is a case that is consistent with the Ninth Circuit's position on this issue, this only shows that there is a more fractious conflict among the circuits which this Court needs to address.[2]

The fact that some of these cases do not arise in the reimbursement context is also unavailing and, in fact, lends further support why certiorari should be granted. In the first place, *Great West Life v. Knudson*, 534 U.S. 204 (2002) itself, was simply an extension of principles announced in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), a case which involved issues of nonfiduciary liability under ERISA, issues which clearly are wholly different than the ones giving rise to this litigation. This, in and of itself, demonstrates that it was based

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1. The Third Circuit has issued a published decision based on its application of *Knudson*. *Skretvedt v. E.I. Dupont de Nemours*, 372 F.3d 193 (3d Cir. 2004).

2. In addition, the Fourth Circuit has indeed followed the majority of circuits on this issue. *In Re Carpenter* 36 Fed. Appx. 80, 82, 2002 U.S. App. LEXIS 10615 (4th Cir. 2002) ("*Knudson* therefore does not affect the conclusion of the bankruptcy and district courts that Wal-Mart has an enforceable equitable lien on Carpenter's settlement proceeds. We agree with the conclusion of the bankruptcy and district courts, and we affirm on their reasoning.").

on principles of general application and that such rules of general application can and will extend to many different contexts. Thus, even if some of the cases cited above are non-reimbursement matters, they apply the principles set forth in *Knudson* and are therefore more than fair game in this Petition. Moreover, that there are non-reimbursement cases that apply *Knudson* only shows how important an issue this is to plans like CHWT. Not only will such principles of constructive trust and equitable lien discussed in *Knudson* apply in reimbursement matters, they, as shown in CHWT's Petition, will be at issue in countless other circumstances. Because these circumstances will always involve plan assets or putative plan assets or monetary benefits that participants may be entitled to, this is clearly an issue of great public importance. For all these reasons, certiorari should be granted in this case.

**B. Although Unnecessary, None Of The Respondents' Arguments On The Merits Withstand Any Scrutiny**

Section V of the Respondents Brief comprises the substance of their response to CHWT's Petition. As noted previously, that response is not directed to whether certiorari should be granted, but one which, at best, weakly supports the merits of the Ninth Circuit's decision. This reply is being made with that qualification in mind and is only being offered for purposes of analytic completeness.

Respondents' argument on the merits founders on two axes of faulty and ill-conceived premises. First, Respondents incorrectly assert that they have committed no wrongdoing here. While wrongdoing need not be shown for CHWT to prevail (an issue that is discussed below), Respondents' assertion is nonetheless patently false. Respondents – in particular, the participant, his family, and their first attorney – signed a lien promising to repay benefits from settlement monies they received from their personal injury lawsuit. When they received such money, the participant and his family deliberately breached their written promise of reimbursement and pocketed the monies they were supposed to tender back to CHWT. This, of course, is clearly wrongdoing. Unfortunately, it was not wrongdoing sufficient for the Ninth Circuit's purposes. This is because, according to the Ninth

Circuit, wrongdoing must occur at the precise time when CHWT tenders benefits, not afterwards when the Respondents wrongfully detain money in contravention of their clear promise upon which CHWT relied. *FMC Corp. v. Owens*, 122 F.3d 1258, 1261 (9th Cir. 1998) ("Owens did not *obtain* FMC's funds by any fraud or wrong-doing. Owens *obtained* the funds pursuant to the Plans, which obligated the funds to be paid to him under the circumstances of this case. FMC's claim is for reimbursement of money that Owens rightfully received under the Plans") (emphasis supplied).) As discussed in the Petition and as will follow, this standard is one followed by the Ninth Circuit alone.

Second, Respondents contend that the Ninth Circuit was correct because the Supreme Court, in *Knudson*, affirmed the *result* the Ninth Circuit reached in that case. That result, of course, was simply that, on the facts of *that case*, the plan there could not seek reimbursement. Respondents transform the tag line in that Supreme Court decision into the Supreme Court's wholesale adoption of *Owens'* "wrongdoing" rationale. The folly of this argument is evident since an affirmance or reversal, in and of itself, can hardly be the basis for dictating rationale or the principles that guide future decisions on the issue presented in such a case. Respondents continue with this train of logic by arguing that *Knudson*'s discussion of the circumstances when a constructive trust or equitable lien would be available is "dicta" which has no bearing on the issues presented here. This argument can easily be dispensed with by referring to the circuit conflict analysis set forth above, and all the courts that have actually applied this "dicta" as a rule of law in cases arising under Section 502(a)(3). As a result, Respondents' reliance on the black letter result of *Knudson* as a basis for extrapolating a rule of law it was announcing is completely misplaced.

Neither is the Respondents reliance on California law helpful to them. Indeed, their citation to California law only strengthens CHWT's side of the argument here. On page 16 of their Brief, Respondents cite to California Civil Code § 2224 to demonstrate the fact that some wrongdoing must be present to impose a constructive trust on another. While that particular

section of the Civil Code does require some wrongdoing in the *acquisition* of property, the section preceding that one, Section 2223, provides for such a trust in instances where the *detention* of the property is wrongdoing itself.

> The principal circumstances where constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224. Section 2223 provides that '[o]ne who wrongfully *detains* a thing is an involuntary trustee thereof, for the benefit of the owner.' Section 2224 states that '[o]ne who *gains* a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.'

This "acquired-detained" dichotomy was one apparently lost on *Owens* and its Ninth Circuit progeny. *Owens* adopted the first part of that dichotomy, but perplexingly dispensed with the second part of it. This is obviously significant in reimbursement cases since, in each such case, there will not be a wrongful acquisition, but a detention issue with respect to the imposition of a constructive trust. This was true in this case where there was no issue of wrongdoing in the initial transfer of benefits (though a theory of fraud may be in order given some of the facts that have developed), but a subsequent question of detention of such funds later on. To apply the Ninth Circuit's rule here would be to erect an insuperable barrier that entities like CHWT could never overcome. To this end, there is simply no court that CHWT is aware of that adopts such an "acquisition only" rule where it applies to constructive trust. This is borne out not only by Civil Code § 2233 above, but by other circuits of appeal set forth in CHWT's Petition that have imposed constructive trusts in "detention" reimbursement cases.

*Harris Trust v. Salomon Smith Barney*, 530 U.S. 238 (2000), a case whose holding the Respondents completely misrepresent to the Court, leaves no doubt as to this conclusion. In that case, the Supreme Court, quoting from Dobbs, asserted the

longstanding equitable rule that a "constructive trust is about property not wrongs." As the plain wording of this rule suggests, there is no wrongdoing requirement necessary to impose a constructive trust. (Even if there were, the Respondents' breach of the promises set forth in their lien is wrongful detention, which, in and of itself, is wrongful conduct sufficient to impose a constructive trust in this case.) Seemingly unable to thwart the dispositive impact of that holding, the Respondents launch an elaborate and byzantine attempt to obfuscate it. In particular, they cite to numerous parts of *Harris Trust*'s decision which mention wrongful conduct, yet lack the basic candor to disclose that those allusions in no way ever signaled the Court's intent to make wrongful conduct a necessary element for a constructive trust. Indeed, in the Respondents fictitious view of things, because *Harris Trust* made several allusions to this wrongful conduct, the Respondents can cobble together some conclusion that these extant references transform Dobbs' clear statement that wrongful conduct is not necessary to a rule requiring such conduct. Apart from the confounding logic that underlies this point, courts have read Dobbs' statement to mean what it says: "Contrary to Rowland's assertions, a plaintiff is not necessarily required to prove wrongdoing by the defendant in order to obtain relief through imposition of a constructive trust or an equitable lien." *Id.* at 597-98. *Rowland*, 367 F.3d at 649.

The Respondents then cite to other works of learned scholars upon whom the Supreme Court relied on in fashioning trust law under ERISA. In doing so, they pass them off as commentators that confirm what they have been arguing all along. This is not only false, it borders on reproachable conduct. For instance, the Respondents represent Section 471 and other sections of George Bogert's treatise on "Law of Trusts and Trustees" to state that a constructive trust may be based on wrongdoing. However, they deliberately omit that part of Section 471 which actually sets forth the rule that constructive trusts need not based on wrongdoing.

> It has sometimes been stated that "fraud" is at the bottom of every constructive trust. "Fraud" is, of course, a very ambiguous word. It may mean

> misrepresentation which would give ground for an action in deceit. It may imply the acquisition of property by some other type of wrongdoing or by any type of inequitable conduct. Certainly, *it is not true that all constructive trusts are based on "fraud"* unless that word is used in its broadest sense to include all conduct which equity treats as unfair, unconscionable and *unjust.*

G. Bogert, Law of Trusts and Trustees § 471, pp. 22-23 (rev. 2d ed. 1995) (emphasis supplied). Also conveniently absent from their discussion of these treatises is Scott, The Law of Trust, 4th ed. 1989. In Section 462.2 of his work, Scott goes even further and states: " A constructive trust may arise, however, even though the *acquisition* of the property was *not wrongful.* It arises where retention of the property would result in the unjust enrichment of the person retaining it."As these commentators explain, while wrongdoing *may* form the basis of imposing a constructive trust, it is by no means a *requirement.* In this case, because Respondents have committed wrongdoing by, among other things, promising but failing to reimburse CHWT for the benefits it paid to them, a constructive trust should have been imposed. This trust should have been imposed on the Vonderharr Respondents' first attorney's trust fund and the Special Needs Trust that was created for the two minor children.[3]

The Respondents round off their argument on the merits by contending that because two pools of money are present here – one which contains benefit payments CHWT made to medical care providers and the other which consists of settlement monies – and because benefits were never explicitly made to the Respondents themselves, relief is unavailable. CHWT can simply respond to this bald statement of the law

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3. It bears noting here that because the Respondents failed to disclose anything about the status of the settlement monies, CHWT is at a loss to determine where some money may be. The first attorney's client trust fund was such a pool of identifiable funds as was the other attorney's client trust accounts. Also, as noted by *Knudson*, a case which (as this one) arose out of California, a Special Needs Trust created for the minor Vonderharrs is in existence and another pool of monies that can be subject to a constructive trust.

by noting that this theory was never one used to justify denying relief under Section 502(a)(3) in any case. In addition, in virtually all the cases in the circuit conflict section mentioned above, there were two pools of money, a fact which did not persuade any of those courts to grant or deny constructive trust or equitable lien relief under Section 502(a)(3).

**C. In Their Brief, Respondents Register No Response To The Circuit Conflict That Exists With Respect To The Fees Issues Discussed In CHWT's Petition. In Addition, They Offer Yet Another Weak Response On The Merits To Those Issues**

In their brief, Respondents make no attempt to address the points raised by CHWT on the jurisdictional issue affecting fee awards under Section 502(a)(3). In particular, they do nothing to reconcile the glaring circuit conflict between all other circuits and the Ninth Circuit on that issue and the fact that the Ninth Circuit itself has admitted to its own intra-circuit conflict on that question. They also fail to take issue with any of the substantive points raised by CHWT. For these reasons, this is simply an admission that certiorari is proper here and that the fee award should be vacated for lack of jurisdiction.

Respondents' response to the "special circumstances" rule is equally infirm. Like the other issues CHWT seeks certiorari on, they race past the issues relating to certiorari and proceed to offer an argument on the merits. Their entire argument on the merits is completely flawed since it is based on a complete misreading of a Ninth Circuit case, *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984). This case is wholly inapposite since it applies to situations where, unlike here, the participant was a prevailing plaintiff and the case involved a suit for benefits. Indeed, it is the exception to the general rule that courts, even as recognized by the Ninth Circuit itself in *Smith*, must apply a five-factor test resembling that set forth in *Hummell v. Rykoff*, 634 F. 2d 446 (9th Cir. 1980). The Ninth Circuit, in fact, did just that in applying that five factor test in a post-*Knudson* matter that is substantively indistinguishable to this one. *Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675 v. Foster*, 332 F.3d 1234 (9th Cir. 2003). While the Respondents quote to portions of

*Smith* that rely on this Court's prior fee decisions, those excerpts are hardly helpful to them if they do not, as here, arise out of the same circumstances as presented in *Smith*. Not only is this evident in that opinion itself, it was evident to the trial judge in this matter, and to the several other circuit courts of appeal referred to in CHWT's Petition that have addressed this issue by applying the five-factor test mentioned above. Accordingly, for all these reasons and those mentioned above certiorari should be granted in this case.

**D. Respondents Raise Other Arguments Which Are Neither Germane To The Issues Bearing On Certiorari Or The Merits In This Case**

Apart from Section V, the remainder of Respondents' Brief is a menagerie of other arguments that are neither relevant to the issues of certiorari nor to that of the merits of this matter. For instance, in Section I, Respondents make an argument on the merits of the preemption ruling in this case. Respondents did not seek certiorari on that issue and it is thus not relevant here. Section II is a rambling discourse on how plan provisions that are buried in pages of plan documents are not readily apparent to participants and thus impose obligations that participants are not aware of. How this issue is relevant at all in this proceeding is baffling. In any case, the Respondents' assertion lacks merit since the participant here was directly alerted to the reimbursement obligation when he signed a lien promising to reimburse CHWT, a lien that he, after being paid medical benefits on his behalf, fraudulently refused to pay them back.

Section III is a frequent refrain made by the Respondents that CHWT could foresee the development of reimbursement jurisprudence in the Ninth Circuit and the federal appellate courts. Based on this foresight, Respondents claim that CHWT could respond to their developing caselaw by requiring that its "underwriters" take into account any financial shortfalls based on that caselaw. This proposition bespeaks a fundamental and grave misunderstanding of multi-employer plans. Such plans are creatures of collective bargaining agreements. They receive funding for contributions made by employers signatory to those agreements, contributions which are set not by "underwriters" but by labor and management

representatives at the bargaining table. These contributions are a small part of a much larger dialogue between labor and management that involves wages, contributions for other entities, and many other issues that qualify as mandatory subjects of bargaining under Section 8(a)(5) of the National Labor Relations Act. Setting aside the point about whether these lay parties could actually foresee how reimbursement law under Section 502(a) would evolve, there is simply no "underwriting" process whatsoever.

In Section IV, the Respondents argue that they were not unjustly enriched. Aside from the overwhelming majority of other courts of appeal set forth above that do not agree with them, it bears repeating that this issue must be viewed through the prism of entities covered by ERISA that owe certain duties to *all* of its participants and beneficiaries, a sentiment expressed by the district court judge in this matter.

> Defendants did not seek to benefit other ERISA participants and beneficiaries of the plan. By retaining the money expended by [CWHT] on their behalf while receiving funds from the underlying state court settlement, [defendants] have actually reaped a windfall at the expense of all... Ultimately the legal question decided in this case will benefit only a subset of participants and beneficiaries. Moreover, as discussed above, Defendants did not seek to vindicate a right under ERISA as much as they sought to secure a windfall from [CHWT's] inability to obtain reimbursement.

Finally, the Respondents claim that the "make whole" doctrine should bar relief in this case. This argument is based on their factual representation that the costs and fees in this case exceed the amount of CHWT's lien. If in fact this were true, CHWT, as noted in footnote 1 of its Petition, contains a similar rule and may in fact end this case. Why they are offering these facts now, however, is completely confounding, and wholly irrelevant to the issues raised here.

## CONCLUSION

For all the foregoing reasons, this Court should grant CHWT's Petition for Certiorari.

Respectfully submitted,

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# In the Supreme Court of the United States

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA, PETITIONER

*v.*

TIMOTHY VONDERHARR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether a civil action brought under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), to enforce a plan term requiring reimbursement of plan-paid medical expenses from funds a participant recovers from a third party responsible for the underlying illness or injury, is an action for "appropriate equitable relief" authorized by that section, when reimbursement is sought through imposition of a constructive trust or an equitable lien on the net proceeds of the third-party recovery.

2. Whether a court lacks subject matter jurisdiction to award attorney's fees under Section 502(g)(1) of ERISA, 29 U.S.C. 1132(g)(1), if it concludes that the plan's reimbursement action is not authorized by Section 502(a)(3).

3. Whether a court that has jurisdiction to award attorney's fees under Section 502(g)(1) of ERISA must ordinarily award fees to a prevailing participant unless special circumstances make an award unjust.

4. Whether the reimbursement and attorney's fee questions are moot in light of the parties' April 14, 2005, settlement.

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# In the Supreme Court of the United States

No. 04-1049

CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA, PETITIONER

*v.*

TIMOTHY VONDERHARR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. Petitioner is a collectively-bargained employee-benefit trust that provides medical benefits to carpenters in the southwest United States. Pet. App. 3a. The plan administered by petitioner contained a reimbursement provision requiring that, if a plan participant or beneficiary

> has received * * * payments * * * in whole or in part for injury or illness for which benefits are otherwise provided by the [plan], you * * * are required to reimburse the [plan] from the net proceeds of these payments, up to the actual amount of benefits paid by the * * * [plan] for expenses arising from that injury or illness.

*Ibid.* The provision also noted that a participant or beneficiary "will be required to sign documents to carry out the [plan's] reimbursement rights." *Ibid.*

Respondent Timothy Vonderharr was covered by the collective bargaining agreement, and he and his dependents were therefore entitled to medical benefits provided by petitioner. Four members of Vonderharr's family were injured in an automobile accident in December 1998. Before petitioner would pay medical benefits, petitioner required the Vonderharrs and their attorney, Charles Weldon, to sign a document giving the plan a lien on any subsequent recovery they obtained as a result of the accident. Petitioner ultimately provided the Vonderharr family $155,224 in medical benefits resulting from the accident. Pet. App. 2a-3a. The Vonderharrs subsequently recovered money in settlements with third parties allegedly responsible for the accident. *Id.* at 4a.

Petitioner brought an action in the United States District Court for the Central District of California against the Vonderharrs and their attorneys to enforce the reimbursement requirement. Pet. App. 4a, 14a. Petitioner asserted claims under state law and a right to reimbursement and declaratory relief under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3). Pet. App. 15a. Section 502(a)(3) permits an action "(A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan." 29 U.S.C. 1132(a)(3). In an amended complaint, petitioner requested imposition of a constructive trust or equitable lien on the proceeds of the third-party recoveries that were in the possession of the Vonderharrs or their attorneys. See Pet. App. 16a, 27a.

2. a. The district court dismissed the state-law claims as preempted by ERISA. See Pet. App. 11a-12a, 27a.[1] The court also dismissed the ERISA claim for reimbursement as not authorized by ERISA. *Id.* at 28a-31a. The court reasoned that a claim for "equitable relief" under Section 502(a)(3) is a claim for a category of relief that was typically available in equity and does not include a claim for legal restitution. *Id.* at 28a-29a; see *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210 (2002). And the district court recognized that a constructive trust and equitable lien are "subspecies of equitable restitution." Pet. App. 29a. The court reasoned, however, that petitioner could not state a claim for such relief, because it could not show that the Vonderharrs and their attorneys had obtained the third-party recoveries "through some wrongful means, such as fraud, duress, breach of fiduciary duty, or unconscionable behavior." *Id.* at 30a. The court deemed it "irrelevant" whether the money was in the possession of the Vonderharrs or their attorneys. *Id.* at 31a.

b. In a later decision, the district court denied respondents' request for attorney's fees under Section 502(g)(1) of ERISA, 29 U.S.C. 1132(g)(1). Pet. App. 14a-24a. Under that provision, in "any action under [Title I of ERISA] * * *, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. 1132(g)(1). The district court concluded that respondents were not entitled to attorney's fees after applying a five-factor test that considers: (1) the degree of the opposing parties' culpability or bad faith, (2) the ability of the opposing parties to satisfy a fee award, (3) whether an award would deter others from acting in similar circumstances, (4) whether the parties requesting fees

[1] The court of appeals reversed the dismissal of the state-law claims. Pet. App. 11a-12a. Petitioner has not sought further review of that ruling, and it is therefore not at issue on this petition.

sought to benefit all plan participants and beneficiaries or to resolve a significant legal issue under ERISA, and (5) the relative merits of the parties' positions. Pet. App. 16a-17a. The district court rejected respondents' request to apply a "special circumstances" rule, under which attorney's fees would generally be awarded to a prevailing plan participant unless special circumstances make such an award unjust. *Id.* at 18a-19a.

3. The court of appeals affirmed the dismissal of petitioner's claims under Section 502(a)(3) of ERISA but reversed and remanded the denial of respondents' motion for attorney's fees. Pet. App. 1a-13a. The court of appeals concluded that an action seeking to enforce an ERISA plan's contractual reimbursement provisions does not fall within Section 502(a)(3). *Id.* at 7a-9a. The court further concluded that restitution and the imposition of a constructive trust are available under Section 502(a)(3), "but only as true equitable remedies and provided the traditional requirements of fraud or wrong-doing are satisfied." *Id.* at 9a. Stating that petitioner's claims "are nothing more than garden-variety legal claims for contractual restitution that are not cognizable under ERISA," the court of appeals affirmed the dismissal of those claims. *Id.* at 11a.

On the attorney's fee issue, the court of appeals held that although the district court's use of the five-factor test "was certainly proper" under Section 502(g)(1), the district court erred by paying "little heed to the principles underlying the 'special circumstances' doctrine." Pet. App. 12a. Finding no "special circumstances" to render an award of attorney's fees unjust in this case, the court reversed the denial of attorney's fees and directed the district court to determine appropriate fees on remand after all state-law claims are determined. *Id.* at 13a.

4. On April 14, 2005, while this petition was pending, the plan settled its claims against respondents. Notice of Settlement, Exh. 1. The Notice of Settlement was filed on April 22, 2005. Meanwhile, after the settlement was reached but before the Court was notified of it, the Court on April 18, 2005, requested the views of the United States. In later letters to the Court, respondents asserted that the settlement moots the claims at issue here and petitioner denied that assertion. Letter from Craig R. McClellan to the Supreme Court of the United States (May 4, 2005) (McClellan Letter); Letter from Desmond C. Lee to the Supreme Court of the United States (Apr. 26, 2005) (Lee Letter).

## DISCUSSION

The court of appeals erred in concluding that petitioner's claim may not be brought under Section 502(a)(3) of ERISA and should therefore be dismissed. Because that issue is important and the court of appeals' decision conflicts with the decisions of other courts of appeals, review of the first question presented would be warranted in an appropriate case. In light of the settlement in this case, however, any dispute about the propriety of petitioner's Section 502(a)(3) action is now moot.[2] Review of the important Section 502(a)(3) ques-

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[2] There is also a question whether petitioner has standing to bring this action as a "participant, beneficiary, or fiduciary" authorized to sue under 29 U.S.C. 1132(a)(3). See *Local 159, 342, 343 & 344; United Assoc. Journeymen Training Trust Fund* v. *Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 981-983 & n.3 (9th Cir. 1999) (plan that is not fiduciary has no standing), cert. denied, 528 U.S. 1156 (2000); *Pressroom Unions-Printers League Income Sec. Fund* v. *Continental Assurance Co.*, 700 F.2d 889, 892-893 & n.8 (2d Cir.) (plan that is not fiduciary has no standing and questioning whether plan can be a fiduciary), cert. denied, 464 U.S. 845 (1983); but see *Saramar Aluminum Co.* v. *Pension Plan for Employees of the Aluminum Indus.*, 782 F.2d 577, 581 (6th Cir. 1986) (plan has standing). Petitioner has not alleged in its complaint or amended complaint that it is a fiduciary, and the lower courts did not address the issue.

tion presented therefore should await another case. See, *e.g.*, *Sereboff* v. *Mid Atlantic Med. Servs., Inc.*, petition for cert. pending, No. 05-260 (filed Aug. 25, 2005).[3] The other two questions presented in the petition are also moot and in any event would not independently warrant certiorari. The petition for a writ of certiorari therefore should be denied.

1. a. In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204, 221 (2002), this Court held that 29 U.S.C. 1132(a)(3) does not authorize "the imposition of personal liability on [plan participants or beneficiaries] for a contractual obligation to pay money" to reimburse a plan for plan-paid medical expenses. The Court reasoned that the "equitable relief" authorized by 29 U.S.C. 1132(a)(3) means "those categories of relief that were *typically* available in equity." 534 U.S. at 210. The relief sought in *Great-West* did not fall within Section 502(a)(3), the Court explained, because it sought, "in essence, to impose personal liability on [plan participants or beneficiaries] for a contractual obligation to pay money—relief that was not typically available in equity." *Ibid.*

The Court in *Great-West* rejected the argument that the petitioners in that case could go forward with their suit under Section 502(a)(3) "because they seek restitution, which they characterize as a form of equitable relief." 534 U.S. at 212. The Court explained that "a plaintiff could seek restitution *in*

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[3] The petition for a writ of certiorari in *Sereboff* presents the Section 502(a)(3) question. The respondent in *Sereboff* is a plan fiduciary entitled generally to bring an action under 29 U.S.C. 1132(a)(3). See note 2, *supra*. Although respondent in *Sereboff* originally waived its right to file a response to the certiorari petition, this Court requested on September 27, 2005, that a response be filed. Based on our review of the petition and the lower court decisions in *Sereboff*, it appears that *Sereboff* squarely presents the Section 502(a)(3) issue and would likely be an appropriate case in which this Court could resolve the conflict in the circuits.

*equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* at 213. In *Great-West*, however, the proceeds of the tort settlement were "not in respondents' possession." *Id.* at 214. Accordingly, the Court concluded that the kind of restitution the petitioners sought in *Great-West* "is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents." *Ibid.*

This case picks up where *Great-West* left off. Despite the other factual similarities between the underlying reimbursement obligation in *Great-West* and the one here, there is one critical difference that should prove outcome-determinative under *Great-West*'s analysis. Petitioner's claim for reimbursement is equitable because it seeks "the imposition of a constructive trust or equitable lien *on particular property*." 534 U.S. at 214 (emphasis added). That property is the money the Vonderharrs or their attorneys received in settlement of the Vonderharrs' third-party tort claims. See Pet. App. 3a (plan document requires reimbursement "from the net proceeds" of a third-party tort settlement). The claims are not for legal reimbursement, because they target particular proceeds and do not seek "to impose personal liability on the defendant[s]." *Great-West*, 534 U.S. at 214.

Contrary to the Ninth Circuit's reasoning (Pet. App. 7a-9a), describing an action to enforce an ERISA plan's reimbursement provisions as "contractual" does not mean that all relief sought is legal rather than equitable. This Court has long recognized that a *contractual* obligation to pay an attorney out of specific funds creates a lien on those funds that may be enforced through a suit in equity. *Barnes* v. *Alexander*, 232 U.S. 117, 121-123 (1914); *Wylie* v. *Coxe*, 56 U.S.

415, 420 (1854). The same rationale applies here. The Vonderharrs' contractual obligation to reimburse petitioner out of their third-party recovery has created a lien on the funds recovered that can be enforced in a suit for equitable relief under 29 U.S.C. 1132(a)(3).

The Ninth Circuit further erred insofar as it concluded that a constructive trust is available in equity only if what it viewed as "the traditional requirements of fraud or wrongdoing are satisfied." Pet. App. 9a; see also *id* at 7a ("breach of fiduciary duty must be present"). As *Barnes, supra*, and *Wylie, supra*, establish, neither an equitable lien nor a constructive trust "is limited to cases of wrongdoing or dishonorable conduct by the defendant." 1 Dan B. Dobbs, *Law of Remedies* § 4.3(3), at 602 (2d ed. 1993); see *id.* § 4.3(2), at 597 (constructive trust "is in no way limited to cases of wrongdoing"). This Court has explained that ERISA permits a court to impose a constructive trust based on a need to prevent unjust enrichment, irrespective of wrongdoing. *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000).

b. Since *Great-West*, the courts of appeals have divided on whether 29 U.S.C. 1132(a)(3) permits an action to recover plan-paid medical benefits in circumstances such as those presented here. Within the last three years, four courts of appeals have held that an action may be brought under Section 1132(a)(3) when the plaintiff seeks to recover specifically identifiable funds that belong in good conscience to the plan and are within the possession and control of the plan participant or beneficiary. See *Mid Atlantic Med. Servs., LLC* v. *Sereboff*, 407 F.3d 212, 217-219 (4th Cir. 2005), petition for cert. pending, No. 05-260 (filed Aug. 25, 2005); *Administrative Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1121-1125 (10th Cir. 2004); *Bombardier Aerospace Employee Welfare Benefit Plan* v. *Ferrer, Poirot*

*& Wansbrough*, 354 F.3d 348, 355-358 (5th Cir. 2003), cert. denied, 519 U.S. 1072 (2004); *Administrative Comm. of the Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan* v. *Varco*, 338 F.3d 680, 686-688 (7th Cir. 2003), cert. denied, 124 S. Ct. 2904 (2004). Two other courts of appeals have recently held that Section 502(a)(3) does not permit a reimbursement action even if those conditions are met. See Pet. App. 8a (discussing *Westaff (USA), Inc.* v. *Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002), cert. denied, 537 U.S. 1111 (2003), and *Qualchoice, Inc.* v. *Rowland*, 367 F.3d 638, 645-649 (6th Cir. 2004), cert. denied, 125 S. Ct. 1639 (2005)).[4]

The conflict is acknowledged, see, *e.g.*, *Mid Atlantic*, 407 F.3d at 219 n.7; *Willard*, 393 F.3d at 1125; *Qualchoice*, 367 F.3d at 645-646, and several courts of appeals have denied petitions for rehearing en banc on the issue. See Pet. App. 35a (decision below); *Varco*, 338 F.3d at 680; *Bombardier Aerospace Employee Welfare Benefit Plan* v. *Ferrer, Poirot & Wansbrough*, 89 Fed. Appx. 905 (5th Cir. 2004); see *Qualchoice*, 367 F.3d at 638. Accordingly, the conflict is unlikely to be resolved without this Court's review.[5]

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[4] Other courts of appeals have also expressly rejected the Ninth Circuit's requirement that fraud or similar wrongdoing must be shown. See *Qualchoice*, 367 F.3d at 649; *Bombardier*, 354 F.3d at 358-360.

[5] Petitioner cites (Pet. 9; Reply Br. 2 n.1) three further decisions as being in conflict with the Ninth Circuit's decision here. *Skretvedt* v. *E.I. DuPont de Nemours*, 372 F.3d 193 (3d Cir. 2004), held that interest on a delayed award of benefits is appropriate equitable relief under Section 502(a)(3) of ERISA because at the time of the divided bench "the constructive trust remedy typically would allow [the plaintiff], in equity, to force [the defendant] to disgorge the gain it received on his withheld benefits under a restitutionary theory." *Id.* at 214. Because the right to the interest on wrongly delayed benefits—as opposed to the benefits themselves—was not directly imposed by the plan itself, the court's reasoning in *Skretvedt* did not directly address the reimbursement question here. In *Gerosa* v. *Savasta & Co.*, 329 F.3d 317 (2d Cir.), cert. denied, 540 U.S. 967 and 1074 (2003), plan fiduciaries sued a

c. Review to resolve the conflict in the circuits would be warranted in an appropriate case, because a plan's ability to obtain reimbursement from a third-party recovery is an important issue for plans and their participants and beneficiaries. Recovering such funds helps plans control the costs of providing benefits to other participants and beneficiaries and precludes double recoveries by tort plaintiffs of medical expenses—first when the plan pays for them and then, again, in a tort suit or settlement. A rule that prohibits the plan's ability to recover, as in the Ninth Circuit, pressures plans either to increase premiums or reduce benefits. See Pet. 5 n.4 (citing a union trust fund's revised plan that limits benefits to a maximum of $2500 where a participant or beneficiary may recover from a third party for the illness or injury for which the fund pays benefits). Increasing premiums or reducing benefits may harm plan participants and beneficiaries who rely on plans to pay for medical treatment they need immediately after an injury or illness, whether or not a later recovery is possible from a third party.

d. This case, however, is not an appropriate vehicle for addressing the reimbursement issue for the straightforward reason that the April 14, 2005, settlement between petitioner and respondents makes the issue moot in this case. In the settlement, petitioner stated that it "does hereby release, acquit and fully discharge [respondents] from any and all

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negligent plan actuary seeking recovery of the costs the actuary's negligence had imposed on the plan. The Second Circuit held that, because "[t]he moneys sought" by the fiduciaries in that case "were never in [the actuary's] possession," *id.* at 321. the actuary "was never 'unjustly enriched,'" and accordingly "no restitution claim can lie against it." *Id.* at 322. Insofar as the decision suggests that, if the moneys sought *were* in the actuary's possession, the fiduciaries could have brought an action to recover the moneys under Section 502(a)(3), its reasoning is in conflict with the Ninth Circuit's result here. *Sackman* v. *Teaneck Nursing Ctr.*, 86 Fed. Appx. 483 (3d Cir. 2003), was an unpublished, nonprecedential decision.

claims, actions, causes of action, demands, rights, damages, costs, attorney's fees, expenses and compensation whatsoever, which [petitioner] has or which may hereafter accrue on account of [petitioner's] claim for reimbursement, subrogation or enforcement of any lien rights" resulting from injuries in the Vonderharrs' automobile accident. Notice of Settlement, Exh. 1 ¶ 1. Although respondents retain a right to litigate if the Court were to grant certiorari, the release is not contingent on the outcome of further litigation. See *id.* ¶ 3.B. ("In the event of any further litigation of the issues in this Action * * * the outcome of such litigation expressly will not affect the finality and validity of the instant Settlement Agreement and Release of All Claims."); cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 (1982) (contingent settlement does not moot case). Petitioner's release therefore moots the reimbursement issue in this case and, if certiorari were granted, presumably would lead this Court to dismiss the petition without reaching that issue. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71 (1997); *Dakota County* v. *Glidden*, 113 U.S. 222, 223-227 (1885) (dismissing case based on settlement despite objection).

None of the arguments in the April 26, 2005, letter to the Court is sufficient to defeat mootness. In that letter, petitioner argues that the settlement does not release all "parties," including a "Special Needs Trust" that "may have been created" pursuant to California Probate Code § 3604(b)(3) (West Supp. 2003) to receive proceeds from a tort settlement that are to be used for one of the Vonderharr children. Lee Letter at 1; cf. *Great West*, 534 U.S. at 220 (not deciding "whether petitioners could have obtained equitable relief against * * * the trustee of the Special Needs Trust"). Respondents' counsel states that "there is no *Special Needs Trust* and never has been." McClellan Letter at 1. In any event, a special needs trust is not among the parties to this

case, and the possible existence of a claim by petitioner against such a trust would not save *this case* from mootness. Moreover, the settlement, in releasing respondents "along with their *agents*, employees, *and assigns*," Notice of Settlement Agreement, Exh. 1 ¶ 1 (emphasis added), appears to release any claim that petitioner may have against any such trust.

Petitioner further asserts that a "collateral circumstances" rule applies, because the settlement keeps in place a judgment against the plan that will have collateral estoppel effects if not reversed. Lee Letter at 2. In some situations, the collateral consequences of a judgment may prevent mootness. See, *e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998) (discussing when collateral consequences of a criminal conviction can save a challenge to a conviction from mootness); cf. *Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115 (1974) (settlement of a strike does not moot a request for a declaratory judgment on the validity of a state law allowing strikers to receive welfare benefits). Here, however, petitioner, by settling, "has voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). Accordingly, petitioner must accept the collateral estoppel effect that the court of appeals' judgment may have in a case involving other parties. Cf. *id.* at 22-25 (court of appeals' judgments are vacated to preclude collateral estoppel effect when mootness results from happenstance, see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), but not when it results from a settlement).[6]

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[6] Petitioner also argues that this case fits within the "capable of repetition yet evading review" exception to mootness and that the "public importance" of the matter defeats mootness. Lee Letter at 1-2. The "capable of repetition yet evading review" doctrine generally requires a showing that "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or

2. The petition presents issues beyond the reimbursement question. Petitioner argues (Pet. 15) that certiorari should be granted to decide whether a dismissal of a reimbursement action is based on a lack of subject matter jurisdiction, such that it precludes the court of appeals' order to the district court to award attorney's fees on remand under Section 502(g) of ERISA. See Pet. App. 12a. Section 502(g) provides that in an ERISA action "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. 1132(g)(1). Petitioner asserts (Pet. 15) that the Ninth Circuit "implicitly" held that it had jurisdiction because it held that the district court should award fees on remand. Pet. App. 13a. In petitioner's view (Pet. 15-16), that holding conflicts with published decisions of two other courts of appeals (citing *Bombardier*, 354 F.3d at 362, and *Varco*, 338 F.3d at 685).

Because petitioner's settlement resolves respondents' claims for attorney's fees, Notice of Settlement, Exh. 1 ¶ 2, the attorney's fee issue is moot. Even if it were not moot, however, further review of that issue would be unwarranted, because the court of appeals had jurisdiction to order the award of attorney's fees and there is no conflict in the courts of appeals on that issue.

a. Assuming that a holding that a district court lacked subject matter jurisdiction would preclude the court from awarding attorney's fees under Section 502(g), see *In re Knight*, 207 F.3d 1115, 1117 (9th Cir. 2000), no such holding

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expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer*, 523 U.S. at 17 (quoting earlier cases). Neither of those conditions is satisfied here, because respondents' failure to reimburse petitioner may easily have been the subject of a fully-litigated lawsuit and because it is very unlikely that the dispute would recur between these parties. The public importance of an issue, of course, does not override Article III's case-or-controversy requirement.

was reached or would have been warranted here. "It is firmly established in [this Court's] cases that the absence of a valid (as opposed to arguable) cause of action does not implicate [*i.e.*, deprive a court of] subject-matter jurisdiction." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Thus, jurisdiction is generally present if "the right of [the plaintiff] to recover * * * will be sustained if the laws of the United States are given one construction and will be defeated if they are given another * * *." *Ibid.* Applying that principle, courts of appeals have concluded that dismissal of a reimbursement action under Section 502(a)(3) of ERISA does not deprive a court of subject matter jurisdiction. See *Mid Atlantic*, 407 F.3d at 217 n.5; *Blue Cross & Blue Shield* v. *Sanders*, 138 F.3d 1347, 1351-1353 (11th Cir. 1998); *Health Cost Controls* v. *Skinner*, 44 F.3d 535, 536-538 (7th Cir. 1995). Instead, such a dismissal would be for failure to state a claim. *Mid Atlantic*, 407 F.3d at 217 n.5; *Skinner*, 44 F.3d at 537.

In this case, the district court had jurisdiction to consider the plan's claim for reimbursement under Section 502(a)(3) because, if the plan's interpretation of that provision were correct, it could obtain reimbursement. Given the conflict in the courts of appeals on that issue, the plan's interpretation was not "'wholly insubstantial and frivolous.'" *Steel Co.*, 523 U.S. at 89; see *Mid-Atlantic*, 407 F.3d at 217 n.5. Accordingly, the district court also had jurisdiction to consider whether to award attorney's fees under Section 502(g)(1) of ERISA, 29 U.S.C. 1132(g).

b. Petitioner notes (Pet. 15-16) that the Fifth Circuit in *Bombardier* and the Seventh Circuit in *Varco* phrased their discussion of the viability of the reimbursement claims in those cases in terms of the district court's "subject matter jurisdiction" over those claims. *Bombardier*, 354 F.3d at 362; *Varco*, 338 F.3d at 686. Those stray references to subject matter jurisdiction, however, reflect the realities that "the

question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action," *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951), and that courts "have been less than meticulous" in their use of "the term 'jurisdictional,'" *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004). In any event, those observations made no difference to the outcome in either case. The end result in both cases was to allow a claim for reimbursement, with no need to consider the issue here concerning an award of attorney's fees against a party that *fails* to establish a right to reimbursement under Section 502(a)(3). Thus, neither court reached a considered holding that the district court would have lacked subject matter jurisdiction or the ability to award attorney's fees if it had denied the claims as seeking relief not available under ERISA.

For those reasons, there is no square conflict in the courts of appeals on whether a district court has authority to award attorney's fees under Section 502(g) of ERISA after finding that a reimbursement action does not lie under Section 502(a)(3). Indeed, even the Ninth Circuit in this case did not directly address the argument that the dismissal deprived the district court of subject matter jurisdiction and therefore of authority to award fees, see Pet. App. 12a-13a, and it is not clear whether that court, if it had addressed the issue, would have concluded that the dismissal here was for lack of subject matter jurisdiction or for failure to state a claim. Cf. *Reynolds Metals Co.* v. *Ellis*, 202 F.3d 1246, 1248 n.2 (9th Cir.) (dismissal of reimbursement claim "could be based either on lack of subject matter jurisdiction or on the merits"), cert. dismissed, 531 U.S. 1061 (2000). For those reasons, further review of the authority of the district court to award attorney's fees in this case would not be warranted, even if the case were not moot.

3. Petitioner also argues (Pet. 17-18) that the Ninth Circuit erred when it awarded attorney's fees under a rule that requires an award to a prevailing participant or beneficiary unless "special circumstances" make an award unjust, and that the "special circumstances" rule conflicts with the decisions of eight other courts of appeals. We agree that the Ninth Circuit erred in this case and that its articulation of the special circumstances standard conflicts with decisions of other courts of appeals that have rejected that standard. Certiorari is not warranted, however, because, as discussed above, the issue is moot in this case. Moreover, the practical consequences of the Ninth Circuit's standard are limited.

a. Section 502(g)(1) of ERISA provides that in an ERISA action "by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. 1132(g)(1). Courts of appeals, including the Ninth Circuit, have used a five-factor test to guide a court's discretion. See, *e.g.*, *Martin* v. *Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 969-970 (8th Cir. 2002) (en banc), cert. denied, 537 U.S. 1159 (2003); *Gray* v. *New Eng. Tel. & Tel. Co.*, 792 F.2d 251, 257-258 (1st Cir. 1986), and cases cited. Those factors are: (1) the degree of bad faith or culpability of the losing party, (2) the ability of that party to personally satisfy an award of fees, (3) whether a fee award would deter other persons acting under similar circumstances, (4) the amount of benefit the action conferred on members of the plan, and (5) the relative merits of the parties' positions. See, *e.g.*, *Gray*, 792 F.2d at 257-258; *Hummell* v. *S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980).

Based on the premise that ERISA "is remedial legislation which should be liberally construed in favor of protecting participants in employee benefit plans," the Ninth Circuit has additionally concluded that if a plan participant or beneficiary "prevails in his suit under [29 U.S.C.] § 1132 to enforce his

rights under his plan, [he] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1985) (internal quotation marks omitted). The Ninth Circuit considers it an abuse of discretion to deny attorney's fees to a prevailing participant or beneficiary in the absence of special circumstances. *McConnell* v. *MEBA Med. & Benefits Plan*, 778 F.2d 521, 525 (9th Cir. 1985).

Whatever the validity of a "special circumstances" test in a case where a participant or beneficiary prevails in a suit to obtain benefits from the plan, the test should not apply when, as here, a plan sues a participant or beneficiary to recover plan-paid medical expenses from a third-party tort recovery. As the district court recognized, ERISA "does not provide employees with a right to be free from a plan's reimbursement provision. * * * Consequently, by defending this action, [respondents] are not seeking to protect their rights under ERISA; they are seeking safe harbor in [the plan's] inability to obtain reimbursement." Pet. App. 18a. ERISA's purpose of protecting the interests of participants and beneficiaries by providing "ready access to the Federal courts," 29 U.S.C. 1001(b); see *Smith*, 746 F.2d at 589, is not implicated here because the plan, not a participant or beneficiary, is seeking such access. The statutory language, authorizing a discretionary award of attorney's fees "to either party," 29 U.S.C. 1132(g)(1), also does not otherwise suggest that one category of litigants should be treated more favorably than another group in cases of this sort. Cf. *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 522 (1994) (rejecting standard that ordinarily allowed prevailing plaintiffs but not prevailing defendants to recover attorney's fees under copyright statute's attorney's fee provision, 17 U.S.C. 505, which gave "no hint that successful plaintiffs are to be treated differently from successful defendants"). Accordingly, there is no basis for the

Ninth Circuit's use of the "special circumstances" test to require a fee award for respondents, some of whom are not even participants or beneficiaries. See Pet. App. 16a (attorneys, who were also sued, sought attorney's fees).

b. Eight courts of appeals have rejected a "special circumstances" or presumptive-award test for awarding attorney's fees under Section 502(g)(1) of ERISA. See *Martin*, 299 F.3d at 969-972 (citing cases).[7] Review to clarify the test for awarding attorney's fees would not be warranted here, however, even if this case were not moot, because it is not clear that whatever variation there is in the tests used by the courts has had significant practical consequences. As discussed above, all courts begin with the five-factor test. That test is open-ended and is sometimes applied to favor plan participants and beneficiaries. See *Gray*, 792 F.2d at 258-259. Additionally, some courts, like the Ninth Circuit, consider whether to award fees in light of ERISA's purpose of furthering the interests of participants and beneficiaries. See *Locher* v.

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[7] The Second and Tenth Circuits use the five-factor test but have not expressly rejected the "special circumstances" test. See *Locher* v. *Unum Life Ins. Co. of Am.*, 389 F.3d 288, 298 (2d Cir. 2004); *Eaves* v. *Penn*, 587 F.2d 453, 465 (10th Cir. 1978). The Seventh Circuit uses a "special circumstances" test that is derived from the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), which entitles a prevailing party to recover attorney's fees from the United States unless the government's position was substantially justified or special circumstances make an award unjust. *Bittner* v. *Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984). The Seventh Circuit's test creates "a modest presumption" in favor of awarding attorney's fees to a prevailing party, plaintiff or defendant, and "imparts flexibility to the standard [for awarding attorney's fees] and continuity with the cases that use a multi-factored approach." *Ibid.* That test and the multi-factor test are "simply alternative ways of making the same basic point: * * * 'was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?'" *Central States, S.E. & S.W. Areas Pension Fund* v. *Hunt Truck Lines, Inc.*, 272 F.3d 1000, 1004 (7th Cir. 2001) (internal quotation marks omitted), cert. denied, 536 U.S. 904 (2002).

*Unum Life Ins. Co. of Am.*, 389 F.3d 288, 298 (2d Cir. 2004); *Nachwalter* v. *Christie*, 805 F.2d 956, 962 (11th Cir. 1986); *Gray*, 792 F.2d at 258-259; *Dennard* v. *Richards Group, Inc.*, 681 F.2d 306, 319 (5th Cir. 1982); cf. *Martin*, 299 F.3d at 972 (stating that "few, if any, fee awards have been denied a prevailing plaintiff in ERISA cases nationwide").

Moreover, it is not clear that the Ninth Circuit's test will be consistently applied to require plans to pay attorney's fees to a prevailing participant or beneficiary. Recently, that court has affirmed the denial of attorney's fees to a participant who prevailed against a plan in the plan's reimbursement action. *Honolulu Joint Apprenticeship & Training Comm.* v. *Foster*, 332 F.3d 1234, 1239-1240 (9th Cir. 2003). The court mentioned the "special circumstances" test, but did not consider it to be separate from the five-factor test or fault the district court's use of the five-factor test. *Ibid.* Future cases will be necessary to see whether the Ninth Circuit follows the *Honolulu* approach, which gives no special weight to the "special circumstances" test, or the approach taken by the panel here, which gives great weight to it. See also *Martin*, 537 U.S. 1159 (2003) (denying certiorari in a case raising the same attorney's fee issue that is presented here).

c. Finally, in *Martin* v. *Franklin Capital Corp.*, cert. granted, No. 04-1140 (to be argued Nov. 8, 2005), this Court will consider the standard governing the award of fees under 28 U.S.C. 1447(c), which provides that an order remanding a removed case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." It is possible that this Court's decision in *Martin* v. *Franklin Capital* will affect the correct understanding of the standards governing the award of attorney's fees under ERISA Section 502(g)(1). Accordingly, further review of this issue before *Martin* v. *Franklin Capital* is decided would in any event be unwarranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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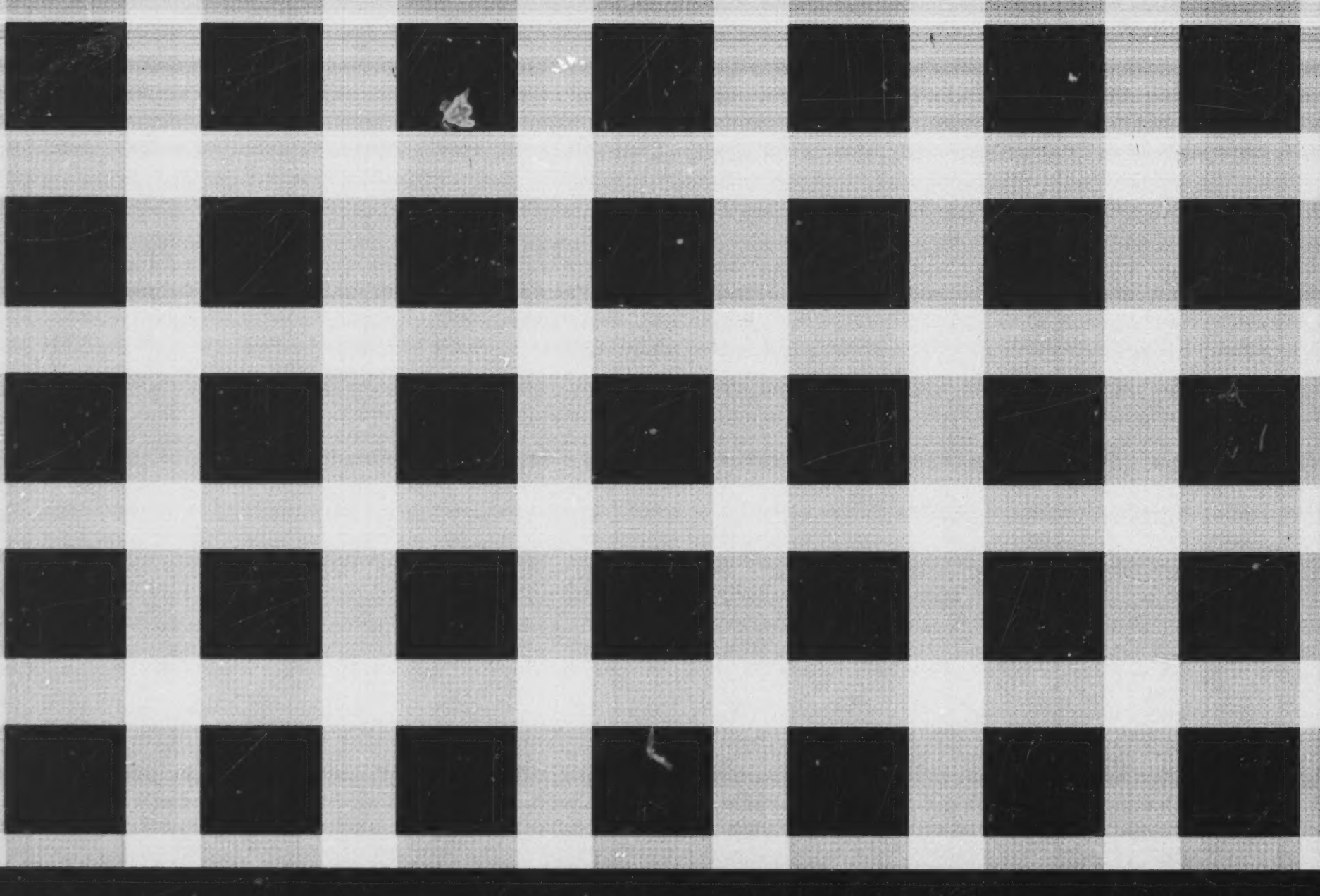
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